INDEX

CITATIONS

Cases:

Cases—Continued Page

Constitution and statutes:

Constitution and statutes—Continued Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1979

No.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Communications Commission and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-56a), is not yet reported. The Notice of Inquiry and orders of the Federal Communications Commission (Apps. C, D and E, *infra*, 60a-116a, 117a-175a, 176a-196a) are reported at 57 F.C.C.2d 580, 60 F.C.C.2d 858, and 66 F.C.C.2d 78.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979 (App. B, *infra*, 57a-59a). On September 14, 1979, the Chief Justice granted an extension of time within which to file a petition for a writ of certiorari to and including November 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether the Communications Act of 1934, read in the light of the First Amendment, grants to the Federal Communications Commission the discretion to follow a policy of declining to review entertainment program format changes when a radio broadcast license is renewed or transferred.[1]

STATUTES INVOLVED

The relevant portions of the Communications Act of 1934, as amended, 47 U.S.C. 151, *et seq.* are set forth in Appendix F, *infra*, 197a-199a.

STATEMENT

1. This litigation results from a continuing disagreement between the Federal Communications Commission and the court of appeals over the appropriate role of the Commission in supervising the

[1] Although the decision of the court of appeals criticizes the Commission for not disclosing a staff analysis paper prior to issuing its Policy Statement (App. A, *infra*, 14a-15a), we do not understand this to be a ground for the court's ruling (see *id.* at 17a note 24). In the event this Court concluded otherwise, however, we would wish to preserve for review the question whether the court of appeals erred in concluding that the Commission was required to make disclosure of the staff analysis paper prior to issuing its Policy Statement.

selection of entertainment programming broadcast by radio stations. The decision below reaffirmed what has come to be known as the "format doctrine" (App. A, *infra*, 30a note 47), which was developed by the court of appeals in a series of decisions reviewing Commission orders granting applications to assign radio station licenses.[2] In those decisions, the court of appeals rejected the Commission's determination of the policy that would best serve the public interest in this area. The court held that when the Commission considers an application to renew or transfer the license of a radio station with a unique, financially viable entertainment format, the Commission must consider whether granting the application will involve a change in that format.[3] If such a change in pro-

[2] See *Citizens Committee to Save WEFM* v. *FCC*, 506 F.2d 246 (D.C. Cir. 1974) (en banc); *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Service, Inc.* v. *FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Citizens Committee (Atlanta)* v. *FCC*, 436 F.2d 263 (D.C. Cir. 1970). See also *Hartford Communications Committee* v. *FCC*, 467 F.2d 408 (D.C. Cir. 1972). Section 402(b) of the Communications Act, 47 U.S.C. 402(b), vests exclusive jurisdiction in the United States Court of Appeals for the District of Columbia Circuit to hear appeals from Commission radio licensing decisions. See *FCC* v. *Columbia Broadcasting System of California, Inc.*, 311 U.S. 132, 133-134 (1940).

[3] Most radio stations now broadcast a specialized type or "format" of entertainment programming, *e.g.*, classical music, country music, all news, etc. This trend toward specialized programming evolved as a result of a number of factors, including the need for radio stations to provide a competitive alternative to television and the increase in the number of radio stations from approximately 600 in 1935 to the current total of approximately 8,500.

gramming format is involved, the decisions of the court of appeals require the Commission to determine whether the change would be in the public interest before acting on the application.

In *Citizens Committee to Save WEFM* v. *FCC*, *supra*, 506 F.2d at 262 (*"WEFM"*), the court of appeals summarized the teaching of its decisions as follows:

> When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment, which may * * * necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest. Finally, it is not sufficient justification for approving the application that the assignor has asserted financial losses in providing the special format; those losses must be attributable to the format itself in order logically to support an assignment that occasions a loss of the format.

2. The "format doctrine" was developed by the court of appeals on review of FCC decisions granting individual applications to assign radio station licenses. As a result of the Commission's concern that the broader implications of the format doctrine had not received adequate consideration either by

the court or the agency during the course of this *ad hoc* litigation, the Commission issued a Notice of Inquiry instituting administrative proceedings on the question (App. C, *infra*).

The Commission solicited comments from interested parties on the appropriateness and feasibility of its supervision of the selection of entertainment programming. 57 F.C.C.2d at 584-585. It also sought comments on the First Amendment implications of such regulation. *Id.* at 585.[4]

---

[4] When the Notice of Inquiry was issued, Commissioner Robinson summarized his views on the "vexing problem" facing the agency in regulating entertainment program formats. 57 F.C.C.2d at 594-595. He concluded that the teaching of *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940), that the Commission should not interfere with competition among broadcasters, continued to reflect wise public policy. He also pointed out what he perceived as acute practical problems in implementing the regulatory standards mandated by the court of appeals:

> The standard for "uniqueness" or "diversity"—the diversity that the public wants enough so as to cause it to grumble when it is diminished—is obviously idiosyncratic and subjective. Quite aside from the constitutional objections * * * this subjective element presents intractable difficulties in administration. What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format "unique" (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. * * * [B]y the subjective standards that the Court seems to embrace, any format is unique; from

Following public notice and comment, the Commission issued a Policy Statement. The Statement concluded that format regulation of the kind required by the court of appeals' *WEFM* decision was inconsistent with the competitive policies adopted by Congress, presented intractable problems of administration, and was unlikely to provide any significant increase in program diversity over that provided by market forces. 60 F.C.C.2d at 858. In reaching this conclusion, the Commission relied on this Court's decision in *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474-475 (1940), which emphasized that

> broadcasters are not common carriers and are not to be dealt with as such. Thus the [Communications] Act recognizes that the field of broadcasting is one of free competition. * * *
>
> * * * * *
>
> Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

---

which it follows, all must be preserved. At that thought the mind swims and the heart sinks.

Commissioner Robinson also emphasized the constitutional problems arising from the "format doctrine." He noted that the Commission "will have 'to oversee far more of the day-to-day operations of broadcasters' conduct' than even would have been the case with mandatory access editorial advertising, a reason of apparently constitutional stature in the Supreme Court's holding in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 126 (1973)." 57 F.C.C.2d at 600.

The Commission added that, if "broadcasters are to compete with one another, * * * they must necessarily do so in the domain of program formats, because there is virtually no other form that competition among broadcasters can take." 60 F.C.C.2d at 860.

The Commission's Policy Statement noted that publicly available data confirmed that competition provides a statutorily sufficient amount of diversity in radio entertainment programming. 60 F.C.C.2d at 863. The Commission explained that market forces are superior to government regulation in selecting types of entertainment programming that listeners actually prefer, and provide "a precious element of flexibility which no system of regulatory supervision could possibly approximate." *Id.* at 864.

The Commission also analyzed the practical difficulties presented by the holding of the court of appeals, which would require the Commission to determine: "(1) what the station's existing format is; (2) whether there are any reasonable substitutes for that format in the station's market; [and] (3) if there are not, whether the benefits accruing to the public from the format change outweigh the public detriment which the format abandonment would entail." 60 F.C.C.2d at 862. The Commission observed that where both the old and new formats were unique, it would be faced with the additional problem of determining which format better served the public interest. The Commission expressed serious doubt about its capacity to determine whether a format is

"unique," and whether reasonable substitutes were available.[5] With regard to the question whether the public would be "better served" by one popular format rather than another, the Commission found that it had no principled basis for making the required determination. *Id.* at 864.

Finally, the Commission's Policy Statement explained that regulation of entertainment formats raised serious constitutional difficulties. The threat of a hearing that might result from an effort to modify a program format would make the risk "of undertaking innovative or novel programming altogether unacceptable." The Commission found that the practical "obligation to continue service [imposed on broadcasters with a unique format] * * * deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no

[5] The Commission pointed out that the court of appeals had previously held that this problem could not be avoided by defining formats broadly. The Commission noted that the court had required the Commission to "distinguish progressive rock music from the other species of the rock genre, *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973) * * * [and] to distinguish between 19th Century and 20th Century classical music, [WEFM] 506 F.2d at 264 n.28 * * *." 60 F.C.C.2d at 862. The Commission also emphasized that "'[w]hat makes one format unique makes all formats unique. * * * Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's "sound" and that citizens' groups (and alas, appellate judges) call format.'" *Ibid.*

off-setting justifications, either in terms of specific First Amendment or diversity-related values or in broader public interest terms." 60 F.C.C.2d at 865. Such a scheme of regulation, the Commission concluded, would have a "chilling effect * * * on program innovation * * * [that] would be injurious to the public interest." *Id.* at 864. The Commission added that format regulation would necessarily result in "entanglement in matters that Congress meant to leave to private discretion," and would infringe First Amendment freedoms "because 'a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed.'" *Ibid.*

3. The court of appeals, sitting en banc, set aside the Commission's Policy Statement. The court reaffirmed the rule previously articulated in *WEFM* and rejected the Commission's conclusion that *WEFM* embodied unwise public policy that could not meaningfully increase program diversity.

The court restated the basic premise of its "format doctrine"—"that the Communications Act's 'public interest, convenience, and necessity' standard includes a concern for diverse entertainment programming." App. A, *infra*, 4a. The court added that Congress has "set aside the radio spectrum" to benefit "'*all* the people' of our richly pluralistic society," not simply "those in the cultural mainstream." *Id.* at 5a. Accordingly, the court concluded that Congress intended in adopting the general "public interest, convenience and necessity" standard of the

Communications Act, that " 'all major aspects of contemporary culture * * * be accommodated by the commonly-owned public resources whenever that is technically and economically feasible.' " *Ibid.*

In an effort to defend the administrative feasibility of its "format doctrine," the court of appeals asserted that the Commission would not be required to conduct hearings in all cases involving license transfers or renewals. The court noted that it would not be necessary to make a "public interest" determination if (App. A, *infra*, 24a-25a):

> (1) there is an adequate substitute in the service area for the format being abandoned, (2) there is no substantial support for the endangered format as evidenced by an outcry of public protest, (3) the devotees of the endangered format are too few to be served by the available frequencies, or (4) the format is not financially viable.

The court also stated that the Commission has discretion to set standards which would minimize administrative difficulties. It indicated that the Commission could establish "rigorous standards" as to when a prima facie case had been made by opponents of the format change, or establish broad format categories rather than narrower ones, thus reducing the likelihood that an abandoned format could be proven "unique" (App. A, *infra*, 29a-30a). The court added that the Commission could be even more "innovative" by basing its decision as to whether the public interest was implicated by a station's change of programming on "the existence of significant and bona fide listener protest." *Id.* at 30a.

Judge Bazelon concurred in the court's decision to set aside the Policy Statement, concluding that the Commission had failed to make disclosure of a staff analysis paper prior to issuing the Statement (App. A, *infra*, 41a). However, Judge Bazelon specifically noted his disapproval of the majority's "unwillingness to give appropriate deference to the Commission's judgment" on the substantive questions before the court. *Ibid.* He asserted that the majority opinion had "virtually confine[d] the FCC to a spectator's role in formulating policies that will promote and preserve diversity while minimizing the hazards of government intrusion into the content of broadcasting" (*id.* at 41a-42a), contrary to this Court's decision in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (App. A, *infra*, 41a note 4). Judge Bazelon added that "the Commission's accommodation [in its Policy Statement] of the conflicting policy interests is neither irrational nor wholly contrary to the purposes of the Communications Act," and noted that the court should not lightly dismiss the FCC's decision "to cast its lot with the marketplace." He also stressed "the 'sensitive First Amendment implications' of government oversight of format choice" and criticized the majority for "fail[ing] to grapple seriously with the constitutional implications of its decision." *Id.* at 42a note 4.

Judges Tamm and MacKinnon dissented, concluding that the majority opinion "usurps the proper role of the [Commission] in the formulation of communi-

cations policy" (App. A, *infra*, 46a). The dissenting judges concluded that the majority had

> mount[ed] untested assumption upon untested assumption to create a theory of regulation that may bear little resemblance to the actual functioning of the broadcast market. Only the Commission, equipped with investigatory tools and a well of experience, may predict in the first instance the behavior of listeners and broadcasters. The majority has simply substituted its views for the Commission's.

Id. at 55a.

The dissent criticized the format doctrine, as articulated by the majority, as a "novel doctrine that calculates the public interest without necessary reference to the aural desires of the greatest number of listeners." *Id.* at 50a. The dissent concluded that the majority opinion had failed to rebut the Commission's showing that it could not do a better job than the marketplace in furthering diversity in entertainment programming:

> The majority has not explained how to decide whether a specific format is unique, how to measure the number of listeners who favor a change in format, or how to compare the intensity of preference between listeners who desire retention of a unique format and those who prefer a variation of a pre-existing format. Finally, the majority has failed to identify the principle within the Communications Act that mandates regulation favoring the interest of fewer listeners over the interests of more listeners.

Id. at 53a.

REASONS FOR GRANTING THE PETITION

1. This case presents important questions regarding the proper role of the Federal Communications Commission in overseeing radio broadcasters' selection of entertainment programming. The decision below deals with the recurring situation in which a renewal or transfer applicant intends to abandon an allegedly unique, financially viable entertainment format, despite "public grumbling" from devotees of that format. The court of appeals directs the Commission in such a situation to consider conditioning renewal or transfer on the retention of the particular entertainment format, even though it is no longer wanted by the broadcaster. This is such a departure from the congressionally conceived plan of maximizing listener satisfaction in radio entertainment through "free competition" among broadcasters (*FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474-475 (1940)) as to warrant this Court's review.

The court of appeals has substituted its own untested factual premises and policy conclusions for the Commission's judgment that regulation of entertainment formats is unnecessary, injurious to the best interests of listeners, and not susceptible to principled decision-making.[6] This arrogation of the agen-

---

[6] One commentator's analysis of the court of appeals' earlier format decisions is equally applicable to this decision:

> The cases are extraordinary illustrations of a court willing to expand its own function at the expense of the agency's discretion, to make remote inferences of policy from amorphous and general statutory language,

cy's "public interest" polic making function conflicts in principle with this Court's recent decision in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).[7]

2. The decision below holds that the Communications Act itself requires Commission adherence to the court of appeals' "format doctrine."[8] Yet, the decision is bereft of statutory analysis that would support this conclusion. Instead, the court relies on its earlier "format doctrine" holdings (App. A, *infra*, 4a-8a). But those precedents are likewise lacking in any substantial statutory analysis.

In *Citizens Committee (Atlanta)* v. *FCC*, 436 F.2d 263, 269 (D.C. Cir. 1970), the first format doctrine

---

and to go beyond mere oversight of the agency's work product to an extended collaborative dialogue with the Commission over what its substantive policies ought to be.

Polsby, *FCC* v. *National Citizens Committee for Broadcasting and the Judicious Uses of Administrative Discretion*, 1978 Sup. Ct. Rev. 1, 17.

[7] In departing from the ordinary rule of judicial deference, the court of appeals referred to the fact that the agency did not publish for pre-decisional comment a staff paper compiling certain publicly available data (App. A, *infra*, 15a, 34a-35a). However, neither the Due Process Clause nor the Administrative Procedure Act requires pre-decision disclosure in a rulemaking proceeding of staff memoranda of this kind. See generally *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978).

[8] The court below has exclusive appellate jurisdiction in broadcast licensing matters (47 U.S.C. 402(b)), thus eliminating the possibility of future conflicts between the circuits, a circumstance which, in other contexts, might justify declining review by this Court at this time.

case, the court of appeals' only attempt to undertake statutory analysis is the bare assertion that "it is surely in the public interest * * * for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible." But Sections 309(a) and 310(d) (then (b)) of the Communications Act, 47 U.S.C. 309a and 310(d), which contain the general "public interest, convenience, and necessity" standard to which the court referred, do not on their face or by necesary implication require the Commission to compel retention of "technically and economically feasible" entertainment formats.[9]

In *Citizens Committee to Save WEFM* v. *FCC*, 506 F.2d 246 (D.C. Cir. 1974), the court of appeals extracted several sentences from this Court's opinion in *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), to buttress the format doctrine previously announced in *Atlanta*. One such passage merely reminded that "[t]he 'public interest' to be served under the Communications Act is * * * the interest of the listening public in 'the larger and more effective use of radio.' § 303(g)." 506 F.2d at 267. But nothing in that sentence or the hortatory lan-

---

[9] The court of appeals offered no additional statutory analysis in its subsequent format doctrine cases. See *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Service, Inc.* v. *FCC*, 478 F.2d 919 (D.C. Cir. 1973).

guage of Section 303(g) of the Act[10] suggests that "the larger and more effective use of radio" must be achieved through Commission regulation of entertainment formats. Nor is the court of appeals' conclusion supported by the observation in *National Broadcasting Co.* that "[t]he avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." 506 F.2d at 267, quoting 319 U.S. at 217. That general statement does not purport to limit the means the Commission may employ to further the desired statutory objective. And it offers no justification for the court's rejection of the Commission's reasoned view that competition, rather than additional regulation, is best adapted to achieve diversity.

3. The Commission does not, of course, dispute that program diversity is an important "public interest" objective. To the contrary, the Commission's Policy Statement explained that a competitive approach to format changes "is the best available means of producing the diversity to which the public is entitled." 60 F.C.C.2d at 863.[11] Prior to reaching that conclu-

[10] 47 U.S.C. 303 provides in pertinent part (emphasis supplied):

> Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> • • • • •
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and *generally encourage* the larger and more effective use of radio in the public interest.

[11] The Commission's analysis heeds this Court's repeated admonition (see, *e.g.*, *CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973)) that radio broadcasting content is generally to be governed by free competition and journalistic discretion rather than regulatory constraints.

sion, the Commission received extensive comments from all segments of the industry and public. 60 F.C.C.2d at 886-872. The Commission thoroughly explored all aspects of the issue of statutory interpretation, while fully informing itself of the constitutional dimensions of the issue. 60 F.C.C.2d at 859-861, 865, 866-871; 66 F.C.C.2d at 78-80.

This evaluation led the Commission to conclude that abridgment of licensee discretion to select entertainment formats was not required by the Communications Act and was, in fact, "inconsistent" with the statute's purpose. 60 F.C.C.2d at 865. In particular, the Commission pointed to Section 3(h) of the Act, 47 U.S.C. 153(h), which provides that a broadcaster may not "be deemed a common carrier." See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940); *CBS* v. *Democratic National Committee*, 412 U.S. 94, 105-109 (1973); see also *FCC* v. *Midwest Video Corp.*, No. 77-1575 (Apr. 2, 1979), slip op. 11-19. Conditioning the grant of a valuable license renewal on the perpetuation of a particular form of programming, no longer desired by the broadcaster, imposes burdens on the broadcaster that are similar to those of common carriers. 60 F.C.C.2d at 860.[12]

[12] As a practical matter, a broadcaster faced with the choice of continuing an unwanted format or surrendering his license normally will choose to continue the existing program service.

Under familiar principles, the Commission's interpretation of its own statute is entitled to substantial judicial deference. *CBS v. Democratic National Committee, supra*, 412 U.S. at 121; *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). When First Amendment considerations are relevant in determining the scope of a statute, the agency's views on constitutional implications are also deserving of "great weight."[13] *CBS* v. *Democratic National Committee, supra*, 412 U.S. at 122. Moreover, as this Court has recently emphasized, the proper accommodation of diversity and other values inherent in the "public interest" standard presents a delicate question requiring agency expertise. Where, as here, that question is addressed by the agency in a "rational" manner, the agency's determination should be affirmed. *FCC* v. *National Citizens Committee for Broadcasting, supra*, 436 U.S. at 814-815.[14]

[13] Section 326 of the Communications Act, 47 U.S.C. 326, provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." This provision reinforces the view that Congress intended the "public interest" standard to be interpreted with the greatest respect for First Amendment values.

[14] The Commission's Policy Statement did not, of course, conclude that the Commission is without authority to review radio programming under all circumstances. This Court has recognized that there are circumstances in which the Commission must go beyond technical considerations in order to discharge its licensing function. See, *e.g.*, *National Broadcasting Co.* v. *United States, supra*. Moreover, there are situations in which the "public interest" in broadcasting demands that the Commission require the broadcasting of certain

4. The Communications Act of 1934 charges the Commission with regulating broadcasting to serve the "public interest, convenience, and necessity." 47 U.S.C. 301, 303, 309(a), 310(d). This Court has interpreted that mandate as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). In exercising that discretion here, the Commission concluded that leaving the selection of entertainment program formats to the judgment of broadcasters, subject to the economic discipline of market forces, was the best method of achieving the necessary level of program diversity.[15] The contrary decision of the court of appeals not only supplants a reasonable administrative interpretation; it also confronts the agency with intractable administrative problems wholly unintended by Congress.

limited types of programs and forbid the broadcasting of other types. See *e.g.*, *Red Lion Broadcasting Co.* v. *FCC, supra; FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). However, the Commission's reasoned determination here was that intrusive regulation was not *necessary* to achieve the statutory objective of program diversity, and that the public interest would better be served by the free functioning of competition than by government fiat.

[15] The decision below implies that the Commission ignored the rights of the listening public in reaching its conclusion (App. A, *infra*, 37a-39a). However, the Commission is of the view that it must take as much interest in the rights of listeners who would be deprived of the benefits of proposed new formats as of those who would lose existing formats. Unlike the court below (*id.* at 37a), the Commission was not

The difficulties of defining entertainment formats and determining whether other stations provide adequate "substitute" formats are substantial. Moreover, determining the actual program preferences of listeners presents formidable difficulties because there is no feasible method to measure the intensity of listener preferences for particular types of programming.[16] In addition, the Commission properly characterized the court of appeals' requirement that it determine whether a format *might* have been financially viable, rather than whether the station in fact *was* financially successful, as an "almost fantastically speculative" task. 60 F.C.C.2d at 863 n.5.

---

willing to justify governmental intervention on the basis of its own subjective or "common sense" view of how listeners are likely to react to format changes.

[16] Both expert testimony adduced at the Commission hearing and a study prepared by the Commission's staff demonstrated that efforts to maximize diversity in entertainment programming through a regulatory scheme such as the "format doctrine" could produce results contrary to the public interest (60 F.C.C.2d at 864, 872-875). That is true because "[t]here is no way to determine the relative values of two different types of programming in the abstract. This is a practical, empirical question, whose answer turns on the *intensity* of demand for each format" (*id.* at 864). Moreover, "there exists no acceptable, reliable way of measuring" the intensity of listener preferences for a particular format because consumers are not required to pay to listen to radio (*id.* at 873). Because of the inability of the Commission to obtain this information, it concluded that it would have no rational basis to determine whether the public interest would better be served by continuation of the station's existing format or by an entirely new format (60 F.C.C.2d at 864).

The decision of the court of appeals fails to take account of the practical problems implicit in its ruling. While reaffirming the Commission's obligation to determine the uniqueness of endangered formats, the availability of alternative programming, and the financial viability of particular formats, the court of appeals asserts that the Commission "need not consider the public interest implications of format abandonment" when those questions are not present (App. A, *infra*, 5a). That, of course, ignores the Commission's obligation to render a decision when those questions do arise. Moreover, it is no answer to assert that "no public interest issue arises if there is an adequate substitute for the endangered format within the service area" (App. A, *infra*, 6a). This disclaimer begs the difficult question, inherent in the format doctrine, of determining when an "adequate substitute" may properly be said to exist.

The court's asserted willingness to defer to Commission discretion in adopting procedures to reduce administrative difficulties offers little comfort. It is clear, for example, that the court will continue to demand that the Commission maintain "administrative means * * * [that are] capable of identifying and rectifying those infrequent situations in which market allocation *has* failed and in which the public interest would not be served by granting the application." App. A, *infra*, 31a. The Commission is thus required to continue to make determinations regarding uniqueness, availability of alternative programming, and financial viability, which it has con-

cluded it cannot render in a principled and rational manner.[17]

Finally, the court of appeals refused to come to grips with the most fundamental administrative difficulty inherent in the "format doctrine"—what is

[17] The court suggested two ways of minimizing the Commission's problem of format classification. The court first said the Commission "could arrive by rulemaking at a format taxonomy which, even if imprecise at the margins, would be sustainable so long as not irrational." App. A, *infra*, 29a. But it is in those cases "at the margins" where outcome-determinative classifications will be most subject to challenge. Inevitably the Commission will be called upon to justify—and will have great difficulty justifying—strict application of any format classification rule in marginal cases.

The court's alternative suggestion was to "dispens[e] altogether with the need for classifying formats by simply taking the existence of significant and bona fide listener protest as sufficient evidence that the station's endangered programming has certain unique features for which there are no ready substitutes in the service area." App. A, *infra*, 30a note 47. Aside from the obvious difficulty of defining what is a "significant" protest in the particular circumstances, the court's suggestion is of help only in turning back hearing requests; it is of no assistance once the case goes to hearing or decision. At that stage, the Commission must attempt to evaluate the proffered evidence of uniqueness and substitutability. Moreover, the court's vague suggestion that the Commission might "require a relatively high level of public grumbling" (*id.* at 30a) ignores the difficulties the Commission would face in tailoring such a requirement to markets of different sizes and in ensuring that the "grumbling" reflects a decided preference of listeners for existing formats rather than proposed formats.

Significantly, the court had no suggestion for reducing the complexity of the financial viability question or minimizing the likelihood that that question would have to be resolved in a hearing.

the Commission's obligation when it determines, consistent with the court's rulings, that the public interest will not be served by the broadcaster's proposed change of program format? While the court stated that the Commission "has no authority * * * to interfere with licensee programming choices," it failed to explain why denial of an application to renew or transfer a license would not result in the forbidden "interference." If the court's format doctrine has any meaning at all, it must necessarily require that, in some instances, the Commission will "interfere" with the broadcaster's selection because the public interest would better be served by alternative programming.[18]

5. The failure of the court of appeals to give adequate consideration to the constitutional implications of its holding is an additional ground for review by this Court. The Commission correctly identified the First Amendment values that are threatened by the unnecessarily intrusive regimen of format regulation. See 57 F.C.C.2d at 585; 60 F.C.C.2d at 865; 66 F.C.C. 2d at 82-83. The risk of losing a license or an opportunity to transfer a license due to changes in program format (whether or not a hearing is in fact required) will substantially "chill" a broadcaster's

[18] The court's prior decision in *WEFM* makes this point explicitly (506 F.2d at 268):

> We think it axiomatic that preservation of a format [which] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest.

willingness to abandon present formats and deter experimentation in new formats.[19] In addition to these "chilling" effects, the court of appeals' format doctrine would inevitably place the Commission in the position of deciding, at least in some cases, the relative "public interest" benefits of different types of entertainment programming.

In *CBS* v. *Democratic National Committee*, *supra*, 412 U.S. at 126-127, this Court held that the Commission could reasonably conclude that the price to be paid in the form of increased government interference with the freedom of broadcasters was too high to justify marginal benefits of broadcast diversity. In this case, similarly, the Commission determined that even if diversity gains could be derived from regulation of program formats, those benefits were far outweighed by the disadvantages of government intervention in programming decisions—matters Congress intended to leave to private discretion. 60 F.C.C.2d at 865.

---

[19] The court's suggestion that the Commission might "exempt from the hearing requirement formats adopted experimentally and sought to be abandoned after a very short period of time" (App. A, *infra*, 31a) hardly eliminates the First Amendment problem. It simply adds another layer of government regulation. Apparently, the court would have the Commission determine (presumably in advance) what is a realistic but "very short" experimentation period for particular format types. Implementation of this proposal would be well beyond the ken of the Commission, given wide variations from community to community in entertainment tastes, mix of existing formats, market structure, and competitive responses.

As Judge Bazelon explained, "regulation of entertainment formats is not content neutral. The regulator is inevitably led to favor some forms of expression over others" (App. A, *infra*, 42a). So long as the Commission is obligated to determine whether a broadcaster's proposed abandonment of one type of programming in favor of another "better serves" the public interest, the agency inevitably will face situations in which it must find that new formats selected by broadcasters must be rejected. In those cases the Commission would be required to override the broadcaster's discretion (and the First Amendment interests of its listeners) by refusing to renew its license or by denying transfer of that license unless the proposed new programming is abandoned.

The court of appeals shrugged off these constitutional difficulties with the statement that it "found no constitutional impediment," and by denying that its format doctrine requires the Commission "to interfere with licensee programming choices" (App. A, *infra*, 25a, 33a). Yet it is plain that an obligation to pass judgment on the public interest value of new entertainment formats proposed by radio stations to take the place of unique formats previously employed is the clearest consequence of the court's decision. If, as the Commission found, the statutory goal of program diversity can be achieved without this substantial abridgment of programming discretion, the decision of the court of appeals poses an unnecessary threat to First Amendment freedoms that ought to be avoided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

DAVID J. SAYLOR
Deputy General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
Attorney
Federal Communications Commission

NOVEMBER 1979

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1692

WNCN LISTENERS GUILD AND CITIZENS COMMUNICATIONS CENTER, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC.
NATIONAL ASSOCIATION OF BROADCASTERS, INTERVENORS

No. 76-1793

CLASSICAL RADIO FOR CONNECTICUT, INC., AND COMMITTEE FOR COMMUNITY ACCESS, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL ASSOCIATION OF BROADCASTERS
CORNHUSKER TELEVISION CORP., ET AL., INTERVENORS

No. 77-1951

THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

METROMEDIA, INC., NATIONAL RADIO BROADCASTERS ASSOCIATION, NATIONAL BROADCASTING COMPANY, INC., CBS, INC., INTERVENORS

Petitions for Review of Orders of the Federal Communications Commission

---

Argued February 7, 1979

Decided June 29, 1979

Before WRIGHT, *Chief Judge*, and BAZELON, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB, and WILKEY, *Circuit Judges*.

Opinion for the court, concurred in by *Chief Judge* WRIGHT, and *Circuit Judges* LEVENTHAL, ROBINSON, ROBB, and WILKEY, filed by *Circuit Judge* MCGOWAN.

Concurring opinions filed by *Circuit Judges* BAZELON and LEVENTHAL.

Dissenting opinion filed by *Circuit Judge* TAMM. *Circuit Judge* MACKINNON joins in *Circuit Judge* TAMM's dissenting opinion.

MCGOWAN, *Circuit Judge*: In cases culminating with *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*), this court, always in the context of the Federal Communications Commission's statutory responsibility to pass upon voluntary assignments of radio licenses, construed that responsibility as comprehending the issue of whether the proposed abandonment of a distinctive programing format was in the public interest. In particular, we said that, where a significant sector of the listening community, in opposition to the assignment, protests the loss of such a format by substantial factual allegations that it is both unique and financially viable, the statute requires that the Commission hold a hearing.

Thereafter the Commission, after notice and comment proceedings, issued a "policy statement" disagreeing with *WEFM*, arguing that the public interest in diversity of entertainment formats is best served by unregulated competition among licensees, and urging this court to repudiate the approach it has taken. *Memorandum Opinion and Order*, 60 F.C.C. 2d 858 (1976) [*Policy Statement*]; 66 F.C.C. 2d 78 (1977) [*Denial of Reconsideration*]. Citizens groups interested in fostering and preserving distinctive entertainment formats petitioned this court for review.* We set the case for hearing *en banc* be-

---

* Petitioners in this consolidated review proceeding are WNCN Listeners Guild and Citizens Communications Center (No. 76-1692); Classical Radio for Connecticut, Inc. and Committee for Community Access (No. 76-1793); and Office of Communication of the United Church of Christ, Mexican American Legal Defense and Education Fund, National Latino Media Coalition, National Council of La Raza, Bilingual Bicultural Coalition on Mass Media, American G.I. Forum, and Public Communication, Inc. (No. 77-1951).

Amici in support of petitioners are Classical Music Supporters, Inc., Committee for Open Media, Consumer Federa-

cause no panel of the court could overrule our *en banc* holding in *WEFM* as the Commission requested.[1] Unpersuaded that our reading of the Act is wrong, we decline the Commission's invitation to announce our abandonment of it.

I

A.

The basic premise of our format cases[2] is that the Communications Act's "public interest, convenience, and necessity"[3] standard includes a concern for diverse en-

---

tion of America, Friends of WONO, Inc., and Louisiana Center for the Public Interest.

Intervenors on respondents' behalf are American Broadcasting Companies, Inc., CBS, Inc., Cornhusker Television Corporation, Covenant Broadcasting Corporation, Covenant Broadcasting Corporation of Louisiana, Inc., Covenant Radio of Oklahoma, Inc., Fetzer Broadcasting Company, Fetzer Television Corporation, KOOL Radio-Television, Inc., KTOK Radio, Inc., McClatchy Newspapers, Medallion Broadcasters, Inc., Metromedia, Inc., National Association of Broadcasters, National Broadcasting Company, Inc., National Radio Broadcasters Association, Newhouse Broadcasting Corporation, Palmer Broadcasting Company, Plough Broadcasting Company, Inc., Radiohio, Incorporated, Rusk Corporation, and WBNS-TV, Inc.

[1] *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 32 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) (*Policy Statement* constitutes "request to this court to reconsider its position in *WEFM*.")

[2] Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*); Citizens to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C. Cir. 1973); Lakewood Broadcasting Serv., Inc. v. FCC, 478 F.2d 919 (D.C. Cir. 1973); Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC, 436 F.2d 263 (D.C. Cir. 1970). *See also* Hartford Communications Comm. v. FCC, 467 F.2d 408 (D.C. Cir. 1972).

[3] Communications Act §§ 309(a); 310(b), 47 U.S.C. §§ 309(a); 310(b).

tertainment programing. Congress set aside the radio spectrum as a public resource and acted to secure its benefits, not only to those in the cultural mainstream, but to "*all* the people"[4] of our richly pluralistic society. It "is surely in the public interest," therefore, "as that was conceived of by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible." *Citizens Committee to Preserve the Voice of Arts in Atlanta v. FCC*, 436 F.2d 263, 269 (D.C. Cir. 1970).

Congress delegated to the Commission the task of ensuring that the license grants are used in the public interest. In particular, the Commission must sometimes consider the loss of diversity (together with other factors bearing on the public interest) when deciding assignment applications involving abandonment of existing formats. It must take a "hard look" at the salient problems, including loss of diversity, when making this public interest determination. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

The Commission need not consider the public interest implications of format abandonment, however, when there are compelling indications that the loss in diversity is not serious or that the assignment is otherwise clearly in the public interest. For example, if notice of the change does not precipitate an outpouring of protest,[5] the Commission may properly assume that the proposed format is ac-

---

[4] National Broadcasting Co. v. United States 319 U.S. 190, 216-17 (1943) (emphasis added).

[5] *See WEFM*, *supra*, 506 F.2d at 254 (over 1,000 protest letters to the Commission); *Progressive Rock*, *supra*, 478 F.2d at 928 (11,000 signatures); *Atlanta*, *supra*, 436 F.2d at 265 (over 2,000 signatures on protest letters and petitions).

ceptable.[6] Similarly, even if a committed and vocal minority engages in significant public grumbling, no public interest issue is raised if their preferred format is the choice of a population segment too small to be accommodated by the available frequencies.[7] Finally, no public interest issue arises if there is an adequate substitute for the endangered format within the service area.[8] In these situations the evidence is strong that the assignment will not result in a troublesome diminution of format diversity. Further, if the format itself is shown to be economically unfeasible in the particular market—*i.e.*, if even an efficiently managed station would have no realistic prospect of economic viability—then abandonment of the existing format does not contravene the public interest and the Commission need not pursue by hearing the alleged loss of diversity.[9]

If the record presents substantial questions of fact material to the public interest, including the public interest in diversity, the Commission must hold an evidentiary hearing.[10] However, no hearing is required

[6] *See WEFM, supra*, 506 F.2d at 262 n.21; *Progressive Rock, supra*, 478 F.2d at 934; *Lakewood, supra*, 478 F.2d at 924 n.9.

[7] In *Atlanta*, for example, a public interest issue was raised when 16% of the listeners in an area served by 20 radio channels preferred the "classical" format available in only one of such channels. On the other hand, we noted that a switch to the format preferred by the majority would make perfect sense if there were only one available channel. 436 F.2d at 269.

[8] *WEFM, supra*, 506 F.2d at 262-265; *Progressive Rock, supra*, 478 F.2d at 929 n.6, 932; *Lakewood, supra*, 478 F.2d 924 n.10; *Atlanta, supra*, 436 F.2d at 271-72.

[9] *WEFM, supra*, 506 F.2d at 262; *Progressive Rock, supra*, 478 F.2d at 931; *see Atlanta, supra*, 436 F.2d at 270.

[10] Under § 309(a) of the Act, 47 U.S.C. § 309(a), the Commission must determine, with respect to a license application,

when the record presents no substantial questions of material fact. If the only issues of substance are the inferences and legal conclusions to be drawn from known facts, the Commission is free to make the public interest determination and decide the application before it.[11] Even when the record otherwise presents substantial fact issues, a hearing is unnecessary if undisputed facts

whether the public interest, convenience and necessity would be served thereby and, if it so determines, must grant the application. Assignment or transfer applications are subject to the same standards and treated in the same manner, 47 U.S.C. § 310(d); *see id.* §§ 308, 309(a). Section 309(d)(1), 47 U.S.C. § 309(d)(1), provides that any party in interest may petition the Commission to deny the application, and that such petition "shall contain specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity]." Section 309(d)(2), 47 U.S.C. § 309(d)(2), provides:

> If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with [the public interest, convenience, and necessity], it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with [the public interest, convenience, and necessity], it shall proceed as provided in subsection (e) of this section.

Subsection (e) governs the procedures for setting the application down for a hearing and notifying interested parties, and, in the case of issues presented by a petition to deny, authorizes the Commission to assign the burden of going forward and the burden of proof.

[11] *Progressive Rock, supra*, 478 F.2d at 930-931; *Lakewood, supra*, 478 F.2d at 924.

establish any one of those situations discussed above in which no public interest issue arises. Thus, a hearing will rarely be needed to determine that (1) there has been no out-pouring of public protest to the format change, (2) the endangered format's devotees are too few to be accommodated by the available frequencies, (3) there is an adequate substitute in the service area,[12] or (4) the format itself is financially unviable.[13]

B.

In response to our *WEFM* decision, the Commission on January 19, 1976 proposed to reexamine the format question. *Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C. 2d 580 (1976) [*Notice of Inquiry*]. It expressed "deep[] concern[]" that *WEFM* threatened "serious adverse consequences for the public interest," *id.* at 582, and doubted that "a system of pervasive governmental regulation," *id.*, could do a better job than concededly imperfect market forces. The "quagmire" of administratively distinguishing among formats militated against regulation, as did the possibility that broadcasters, to avoid being locked in to an unprofitable format, would cease experimenting with unusual programing approaches. *Id.* at 582-84. The "policy," as the Commission chose to characterize it, imposed by this court also raised questions under the First Amendment warranting "prompt and thorough review." *Id.* at 585. The Commission, in short, was "concerned that the course charted by the Court may lead only to expense, delay and stagnation, with no assurance that a decision finally reached by the Commission would be in any sense superior to (or more in the public

[12] *Lakewood, supra*, 478 F.2d at 924 n.10; *compare Progressive Rock, supra*, 478 F.2d at 932.

[13] *Lakewood, supra*, 478 F.2d at 921-22 n.2, 924 n.11.

interest than) that favored by the marketplace." *Id.* at 584.

In light of these misgivings, the Commission proposed to reconsider whether it "should play any role in dictating the selection of entertainment formats." *Id.* It solicited public comments on the statutory and constitutional considerations described above. It also invited "[p]arties who favor some degree of government involvement" to address a number of questions [14] bearing

[14] (a) When should the Commission become involved in format changes—i.e., in all cases or only those where there is a significant public outcry? See *Citizens Committee to Keep Progressive Rock, supra* at 934. Also, how do you determine significant public outcry?

(b) Should the Commission attempt to categorize entertainment formats and, if so, on what basis?

(c) Other than a general objection to a proposed change in entertainment format, what burdens should be placed on members of the public to demonstrate that a unique format is being abandoned?

(d) If an applicant proposes to change from an alleged unique format, what showing is necessary to justify the proposed change? Also, if financial hardship is alleged, what showing should be submitted by an applicant justifying the losses?

(e) In cases of an alleged unique format, what consideration should be given to factors such as: (i) the similarity of other formats in the market; (ii) the population and areas served by broadcast facilities; (iii) the audience of the respective stations; (iv) the hours of operation, type of service (e.g., AM, FM, educational), and the like? Further, in hearing cases involving alleged unique formats, what should be the burdens of the respective parties?

(f) If an applicant proposes to change from one unique format to another, should a hearing be held to determine which will better serve the public interest?

[Continued]

on the practical implementation of WEFM.[15]

---

[14] [Continued]

(g) Should the Commission consider a change from an alleged unique format only when the station is being sold, at license renewal time, or at other times?

(h) Is the maximization of program diversity necessarily in the public interest? That is, does the maximization of entertainment formats necessarily result in the maximization of consumer satisfaction?

57 F.C.C. 2d at 584-85.

[15] Chairman Wiley wrote a separate statement emphasizing the subjectivity of classifying formats and criticizing *WEFM* for erecting barriers to entry to successful entertainment formats. Commissioner Robinson contributed a concurring statement expanding on the *Notice of Inquiry* and criticizing *WEFM*, in addition, for placing the entire weight of the obligation to promote diversity on the licensee planning to abandon a "unique" format.

Commissioner Hooks, in a separate concurring statement, stressed the difficulties minority audiences experience in receiving their preferred programing. In his view, *WEFM* did not demand "format allocation on a grand scale and a system of intimate monitoring." *Id.* at 589. Believing that the Commission's energies were better spent "devising tenable standards to apply rather thar battling speculative aberrations," he suggested a "common sense" reading:

> To determine whether a format is unique in the community, I would use only a threshold test of conspicuous generic equivalence . . . . To determine whether there is significant grumbling" about a proposed format change, I would compare the magnitude of the protest to the magnitude of the service area using a zone of reasonableness concept. I would interpret economic feasibility as consistent with a profit comparable to the average station in the market (or like market) since I don't believe the court expects anybody to labor for less than fair recompense.

Id.

Comments were filed, and on July 30, 1976, the Commission repudiated the *WEFM* decision on four principal grounds. First, *WEFM* misread the Communications Act because it imposed "common carrier-like" obligations in violation of congressional intent that broadcasters compete freely [16] and not function as common carriers.[17] *Policy Statement*, *supra*, 60 F.C.C. 2d at 859-61. Second, the administrative record—in particular a Commission staff study appended to the *Policy Statement*—demonstrated that competition was highly effective in producing format diversity. Competition, in the Commission's view, has resulted in an "almost bewildering array" of formats in major markets, *id.* at 863, and has facilitated listener choice among stations broadcasting the same format, *id.* at 863-64; conversely, regulation under *WEFM* would probably deter innovative programing. *Id.* at 865. Third, administering *WEFM* would pose vexing administrative problems: formats are difficult to categorize and the costs of a hearing would be enormous, particularly since the doctrine applies logically in license renewals as well as in assignment applications. *Id.* at 861-63, 864-65. Finally, *WEFM* improperly invaded First Amendment interests by chilling broadcasters' programing choices and by imposing an obligation to continue service. In short, *WEFM* would impose "comprehensive, discriminating, and continuing state surveillance," [18] which the Commission believed

---

[16] The Commission quoted *FTC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940):

> Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

[17] 60 F.C.C. 2d at 859-60, *citing* § 3(h) of the Act, 47 U.S.C. § 153(h), set forth at note 36 *infra*.

[18] 60 F.C.C. 2d at 865, *citing* Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

> would be flatly inconsistent with our understanding of congressional policy as manifested in the Communications Act, contraproductive in terms of maximizing the welfare of the radio-listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation and experimentation in radio programming.

Id. at 865-66.

The *Policy Statement* concluded with a comment on the "partnership" between the Commission and the Court of Appeals. *Id.* at 865, *citing Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). In the Commission's view, "when such 'partners' come to a point of fundamental disagreement, it is incumbent upon us to take a step back and rethink our entire position if this relationship is to be creative rather than destructive." 60 F.C.C. 2d at 865. The Commission contended that in the present docket it had engaged in such a reconsideration; by implication, it requested this court also to take a step back and rethink our *WEFM* decision. However, the Commission vowed to implement fully *WEFM*'s specific mandate that a hearing be held in that case. Further, it stayed implementation of its "new policy" until the completion of judicial review thereof. *Id.* at 866.[19]

---

[19] Commissioner Robinson wrote a separate statement endorsing the majority opinion and reiterating his view that *WEFM* imposed unfair burdens on the licensee proposing to abandon a unique format. He also added a word about the proper roles of court and agency:

> Just as the Court doubtless does not intend by this or any other expression to suggest that it has the responsibility for original formulation of communications policy or *de novo* review of Commission actions . . . so it should not be understood by our action here that we construe this partnership notion to give us the right to overrule the Court's mandate. While we draw on this partnership concept to support our firm expression of independent views on this matter contrary to those of the Court of Appeals, I trust all will recognize that we do so in the respectful posture of a junior partner who knows how to march once the marching orders have been authoritatively pronounced—one and for all.

60 F.C.C. 2d at 883.

Commissioner Hooks dissented because "the majority does not provide a mechanism to ensure service to significant minority tastes and needs if market forces do not." *Id.* at 882. He believed it incumbent on the Commission to make an especially searching examination of license assignment proposals involving loss of unique formats, and reiterated his belief that the Commission could adopt an approach to implementing the *WEFM* decision that minimized its intrusive features.

The Commission attached two appendices to its *Policy Statement*. Appendix A was a summary of the comments pro and con on the various issues raised by the *Notice of Inquiry*. Appendix B was a staff document, prepared after the close of the comment period, which argued on theoretical and empirical grounds that *WEFM* was not superior to the free market and that competition among licensees had resulted in a high degree of format diversity. Using statistical techniques to test the hypothesis that format type has no effect on audience ratings —*i.e.*, roughly, that the degree of variation in audience share among stations programing the same format was as great as the variation among stations programing different formats—the staff concluded that, although format type did have a statistically significant impact on audience share, the magnitude of that impact was small. In the staff's view, this study demonstrated *WEFM*'s "decisive flaw" in assuming that duplication of stations within a format is wasteful in terms of listener satisfaction. *Id.* at 873.

On August 25, 1977, the Commission refused to reconsider the *Policy Statement*. *Denial of Reconsideration, supra.*[20]

II

Although the Commission claims to have taken a "step back" and impartially reexamined the issue, its treatment of the format decisions, and of citizens groups seeking to enforce them, has been such as to cast serious doubt on the rationality and impartiality of its action. Two facets of the *Policy Statement* stand out in this connection: the Commission's reliance on a previously undisclosed staff study, and its contention that enforcing *WEFM* would be an "administrative nightmare".

A.

Even a brief perusal of the *Policy Statement* reveals that the staff study, which was issued as Appendix B thereto, had a major influence on the decision. The Commission cited it in the body of the *Policy Statement* as showing "decisively . . . how effective the tool of competition has been in carrying out Congress' plan for entertainment programming";[21] as supporting the conclusion that "the marketplace is the best way to allocate entertainment formats in radio";[22] and as strongly indicating that listeners carefully discriminate among stations programing the same format.[23] In view of the study's importance, we might have expected that, before

[20] Commissioner Fogarty, a recent appointee, concurred "to the extent [the *Denial*] respectfully seeks further judicial guidance," 66 F.C.C. 2d at 86, but expressed "basic agreement" with the thrust of *WEFM*. Commissioner Hooks dissented without opinion.

[21] *Policy Statement, supra,* 60 F.C.C. 2d at 861.

[22] *Id.* at 863.

[23] *Id.*

reaching a decision, the Commission would release it for adversarial testing of its data base, methodology, and conclusions. *See generally United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 251-52 (2d Cir. 1977; *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631-33 (D.C. Cir. 1973). Yet it appears that, prior to the issuance of the *Policy Statement*, only the Commission itself knew of the study's existence.

The Commission's failure to disclose this important technical document for public comment not only diminishes the assurance that its decision is substantively accurate, but also raises questions of procedural fairness to the parties opposed thereto. Aggravating the procedural aspect in the present case are certain statements made by the Commission in response to inquiries from citizens groups. Several times during the comment period, for example, petitioners requested the Commission to contract for an independent study of format diversity, J.A. at 145, 153; *id.* at 160, 161; *id.* at 237, 238. Petitioners argued that the *Notice of Inquiry* lacked a sufficient data base, that the industry-commissioned studies filed during the comment period were biased, and that petitioners did not have the resources to fund their own studies. The Commission denied these requests on February 19, 1976, and May 24, 1976, J.A. at 164, 169; *id.* at 247, 248. On March 29, 1976—four months before the issuance of the *Policy Statement*—the Commission's Broadcast Bureau responded to a Freedom of Information Act request for "all data, reports and memoranda utilized or proposed to be utilized by the Commission in this proceeding . . .," J.A. at 48, without indicating that it planned to use a staff study in deciding the *Inquiry*. Although perhaps accurate when made, these statements created the somewhat misleading im-

pression, which the Commission could usefully have corrected, that no studies would be undertaken.

The Commission argues that the parties had an adequate opportunity to comment on the study on petition for reconsideration. The heavy burden on any petitioner for reconsideration, however, surely makes the opportunity to comment at this stage a less than adequate substitute for the chance to influence the Commission's initial decision. That the Commission was not open-minded at this stage is evident from the record. It apparently required a Freedom of Information Act request for petitioner Citizens Communications Center to obtain a description of the methodology used in preparing the study. J.A. at 68-87. This description was provided on September 15, 1976, two weeks after the expiration on the time period for reconsideration petitions.

Even if we accepted at face value the Commission's representation that it would have considered a request for reconsideration filed out of time if based on newly-disclosed material, our misgivings would not be fully assuaged. The Commission's Freedom of Information Act response contained computer worksheets which were obscure if not incomprehensible to readers lacking a key to the meaning of the figures. Citizens Communications Center requested such a key in a letter to the Commission dated March 22, 1977. J.A. at 100-100A. The Commission's response, which contained such a key, *see* J.A. at 573-75, was apparently sent only to the Citizens Communications Center and not to other petitioners as might have been expected had the Commission acted out of a good faith desire to obtain comments on the study. Some petitioners claim that the first they knew of this key was when the Commission designated it for inclusion in the Joint Appendix filed in this court. In short, it is open to serious question whether even after issuance of the *Policy Statement* the petitioners were given information

about the study's design and data base sufficient to allow meaningful comment thereon, and whether, if such comment had been feasible, the Commission would have received it with an open mind.[24]

B.

One of the Commission's principal grounds for repudiating the format decisions was the contention that implementing them would be an "administrative nightmare", imposing "enormous costs on the participants and the Commission alike." [25] The hearing on remand from the *WEFM* decision, which was said to be "fairly typical" of format abandonment proceedings, involved the following:

> [A]n administrative law judge held two prehearing conferences in Washington, D.C.; his preparation time was an additional eight hours. In addition the Broadcast Bureau trial staff spent above two hundred man-hours of preparation time. Subsequently, hearings were held on nine separate dates in Washington, D.C., and on nine different dates in Chicago, from which a transcrip of 3120 pages was compiled. Following the hearings, the Broadcast Bureau spent two hundred and forty hours preparing proposed findings of fact and the administrative law judge will have spent approximately two hundred and eighty hours preparing his initial decision.[26]

---

[24] Petitioners urge this defect as an independent ground for overturning the Commission. We agree that the study does raise serious questions about the overall rationality and fairness of the Commission's decision. However, because certain broader defects, of which the study is symptomatic, are fatal to the Commission's action, we need not decide whether the failure to obtain public comment on the study is itself of sufficient gravity to warrant rejection of the *Policy Statement*.

[25] 60 F.C.C. 2d at 865, 864.

[26] *Id.* at 864-65.

The Commission was particularly concerned with the burden of such hearings because, in its view, they would also be required when a licensee that had changed its format mid-term (without transferring the license) applied to the Commission for license renewal.[27]

While we do not wish to minimize the burdens of a format abandonment hearing, the truth is that in the sunlight of the facts the Commission's "administrative nightmare" turns out to be little more than a dream. The Commission professes that it has sought in good faith to administer format changes ever since the *Atlanta* decision in 1970. An examination of the actual burdens imposed on the Commission by the cases that have reached this court during that period—all involving license assignment applications—is highly instructive.

In *Atlanta*, this court reversed the Commission's approval without a hearing of a license assignment involving a change from classical music to "a blend of popular favorites, Broadway hits, musical standards, and light classics," 436 F.2d at 265, and remanded the case for an evidentiary hearing on the alleged unprofitability of the existing operation, the accuracy with which views of prominent citizens were represented, and the degree to which listeners were provided with classical music from other broadcast sources. However, no hearing was held on remand because the parties settled the matter among themselves. In *Progressive Rock* we remanded a case involving a proposed shift from "progressive rock" to "middle of the road" for a hearing on the issues of financial viability and alternative sources of the format. Again the parties apparently settled the dispute and no hearing was held. In *Lakewood*, a case involving a proposed switch from "all-news" to "country and western," we found no substantial dispute over the issues of financial viability and alternative sources of the format, and

[27] *Id.* at 861.

hence upheld the Commission's approval of the application without a hearing.

Finally, in *WEFM*, we remanded a case involving a switch from classical to rock music for a hearing on the questions of financial viability, accuracy of community leader surveys, and availability of alternative sources. A hearing was held, and the Administrative Law Judge issued an initial decision proposing to grant the application. *Zenith Radio Corp.*, F.C.C. 76D-47 (1976), 76D-46 (1977). Subsequently, however, the parties agreed to a settlement in which the petitioner to deny agreed to withdraw its objection in exchange for certain actions designed to strengthen alternative sources of classical music in the listening area. The Commission approved the settlement. *Zenith Radio Corp.*, F.C.C. 78-102, 42 Pike & Fischer Radio Reg. 2d 472 (1978).

In light of this history, the Commission's fears appear somewhat less than realistic. In nearly ten years, a mere handful of format change cases have reached this court. Of these, one—*Lakewood*—resulted in the Commission's being affirmed on grounds indicating that in many cases no hearing would be required. Two—*Atlanta* and *Progressive Rock*—were remanded but were settled before a hearing could be held. In the entire history of the format cases, only *one* case—*WEFM*—has resulted in a hearing; and even this was settled prior to administrative appellate procedures. The hearing that did occur, although by no means inconsequential in scope, was nevertheless less extensive than the typical comparative renewal proceeding.[28] Nor does the burden promise to be significantly greater in the future. At oral argument, the Commission's counsel, upon inquiry from the bench, estimated that "perhaps half a dozen" petitions to deny based on

[28] *See* Note, Judicial Review of FCC Program Diversity Regulation, 75 COLUM. L. REV. 401, 406 n.33 (1975).

format changes were then pending. If past experience is a guide, few, if any, of these will eventuate in a hearing.

The Commission also argues that the administrative burden is excessive because format hearings will be required in the renewal as well as the transfer context. We do agree that the format cases logically apply to renewal applications.[29] But we do not believe that renewals will open the flood gates to the administrative hearing room, because the safeguards against excessive numbers of hearings are as present in the renewal context as in the assignment context. No hearing will be required on a renewal application if the abandoned format is financially unviable, if it is not unique in the listening area, or if there has been an insufficient outpouring of public protest against the change.

Apparently recognizing its untenability, the Commission's counsel, at oral argument before us, conceded that the "administrative nightmare" characterization was an "exaggeration" and personally assured the court that the argument was not "very significant at all" to the Commission's decision. Yet this concession does not retroactively make rational the Commission's ill-advised reliance on the issue. And we cannot but view with considerable suspicion an administrative agency's decision that lays such stress—to the point of almost frenzied rhetorical excess—on an argument which, in light of the actual facts, appears so lacking in merit.[30]

---

[29] By the same logic, however, *WEFM* does not apply to format changes made mid-term by the licensee, except insofar as such changes are placed in issue at renewal time.

[30] The "administrative nightmare" argument calls to mind an earlier controversy in which similar contentions were made. *See* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Office of Communication of United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969); text at pp. 48-49 *infra*.

III

The staff study and administrative nightmare issues are merely the most striking examples of certain more pervasive problems. Throughout the format controversy, the Commission has displayed a deep-seated aversion to the decisions of this court (and to the advocates of those decisions) while at the same time misinterpreting and exaggerating their meaning. Perhaps as a result of these interrelated defects, the Commission failed to take affirmative steps to minimize what it perceived as the intrusive features of the format decisions while preserving their essence.

A.

It has been evident from the start that the Commission's response to the format decisions would be something less than enthusiastic cooperation. Professing time and again that entertainment programing is very broadly, if not wholly, committed to licensee discretion,[31] the Com-

---

[31] In the administrative decisions and briefing to this court in the *Atlanta* case, the Commission argued repeatedly that if the proposed format serves a significant audience segment then a determination to use that format is a judgment for the broadcaster to make, not the Commission. *Atlanta, supra*, 436 F.2d at 269; Glenkaren Assocs., Inc., 14 Pike & Fischer Radio Reg. 2d 104, 105-106 (1968) (initial decision); 19 F.C.C. 2d 13, 15 (1969) (denial of reconsideration). We rejected this argument in *Atlanta*, 436 F.2d at 272.

Our *Atlanta* decision, however, did not deter the Commission from pressing its belief in licensee discretion in later cases. *See* Charles A. Haskell, 36 F.C.C. 2d 78, 87 (1972), *aff'd on other grounds, Lakewood, supra* (public interest "best served by not hampering a licensee's flexibility in choosing or changing formats"); Twin States Broadcasting, Inc., 35 F.C.C. 2d 969, 971 (1972), *rev'd, Progressive Rock, supra* (format choice "primarily in the discretion of the licensee and unless it is shown or appears to the Commission that the format choice is not reasonably attuned to the tastes and general interests of the community of license, we shall not

mission has never initiated a hearing in a format change case and has repeatedly urged this court to reverse or drastically curtail the decisions.[32] And it instituted the present proceeding in the nature of rulemaking with the apparent purpose of overruling the *WEFM* case. Whatever its power generally to proceed by rulemaking rather than adjudication, we think it a somewhat different matter when the seeming purpose of the rulemaking is the circumvention of a recent court decision reached in an adjudicatory context.

These misgivings are not allayed by the record of the present proceeding. It hardly requires a literary critic to discern that the *Notice of Inquiry's* "questions" about *WEFM* were for the most part rhetorical. Those favor-

---

question the licensee's judgment in these matters"); *id.* at 974 (Commissioner Johnson, dissenting) (majority decision is "clear and direct violation of the law as interpreted by the Court of Appeals"). Similarly, in Zenith Radio Corp., 40 F.C.C. 2d 223, 230 (1973) (Additional Views of Chairman Burch), *rev'd*, *WEFM*, *supra*, six of the seven Commissioners joined in the view that a station's entertainment program format "is a matter best left to the discretion of the licensee or applicants." Although the Commissioners did promise to take an "extra hard look" at proposals depriving communities of unique formats, 40 F.C.C. 2d at 231, this was repudiated in the *Policy Statement* here under review. 60 F.C.C. 2d at 866 n.8.

[32] *See, e.g.*, *WEFM*, *supra*, 506 F.2d at 260 n.17; *Progressive Rock*, *supra*, 478 F.2d at 930 ("[i]t is our distinct impression . . . based on the briefs and oral arguments . . . that the Commission desires as limiting an interpretation as is possible. We suspect, not altogether facetiously, that the Commission would be more than willing to limit the precedential effect of [*Atlanta*] to cases involving Atlanta classical music stations"); Zenith Radio Corp., 38 F.C.C. 2d 838, 845-46 (1972), *reconsideration denied*, 40 F.C.C. 2d 223 (1973), *rev'd* *WEFM*, *supra* ("extention of [the *Atlanta*] holding beyond the limited confines of the facts and circumstances therein would be most unwise").

ing *WEFM* could not have been heartened to read of the Commission's "deep[] concern[]" that *WEFM* "may lead only to expense, delay and stagnation, with no assurance that a decision finally reached by the Commission would be in any sense superior to that favored by the marketplace," and that the decision might cause "serious adverse consequences for the public interest." 57 F.C.C. 2d at 582, 584, 582. The indications in the *Notice of Inquiry* that the Commission would not give pro-*WEFM* comments due consideration were borne out by later events. Its *Policy Statement*, as we have noted at length, relied heavily on a staff study which had not been placed in the record for public comment. Moreover, the Commission ignored completely comments, which it had solicited, *see* note 14 *supra*, concerning how *WEFM* could effectively be administered.[33]

B.

Closely related to the Commission's innate aversion to our format decisions is its sometimes drastic misreading of those cases. It analyzed the problem in stark terms: formats are to be chosen *either* by market forces *or* by "the alternative to the imperfect system of free competition . . . a system of broadcast programming by government decree." *Denial of Reconsideration*, *supra*, 66 F.C.C. 2d at 81. *WEFM*, in the Commission's view, is the antithesis of the free market: it mandates a "system of pervasive governmental regulation," *Notice of Inquiry*, *supra*, 57 F.C.C. 2d at 582, requiring "comprehensive, discriminating, and continuing state surveillance." *Policy Statement*, *supra*, 60 F.C.C. 2d at 865, *citing Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

Having framed its analysis in Manichaean terms, it is not surprising that the Commission found numerous

---

[33] *See* J.A. at 206-225 (Comments of WNCN Listeners Guild); *see also id.* at 338-341 (Petition for Reconsideration of Office of Communication of United Church of Christ *et al.*).

flaws in our format cases. There would no doubt be severe statutory and constitutional difficulties with any system that required intrusive governmental surveillance, dictated programing choices, forced broad access obligations, or imposed an obligation to continue in service under any and all circumstances. Moreover, any system of pervasive regulation of the type envisaged by the Commission would indeed be an "administrative nightmare," a "quagmire" that the agency would be well-advised to avoid.

The truth is that the actual features of *WEFM* are scarcely visible in this highly-colored portrait. As we have emphasized before and repeat today, *WEFM* was *not* intended as an alternative to format allocation by market forces. We fully recognized that market forces do generally provide diversification of formats. The licensee's discretion over programing matters is therefore very broad while the Commission's role is correspondingly narrow[34] However, we also recognized—as does the Commission—that the radio market is an imperfect reflection of listener preferences. Because broadcasters earn their revenues from advertising, they tend to serve young adults with large discretionary incomes in preference to demographically less desirable groups like children, the elderly, or the poor. *See WEFM, supra*, 506 F.2d at 268.

Further, as is clear from our earlier cases, the Commission's obligation to consider format issues arises only when there is strong prima facie evidence that the market has in fact broken down. No public interest issue is raised if (1) there is an adequate substitute in the

[34] *See Progressive Rock, supra*, 478 F.2d at 929 (most format changes do not substantially diminish diversity and thus may appropriately be left "to the give and take of each market environment and the business judgment of the licensee"); *Atlanta, supra*, 436 F.2d at 272 (licensee has "considerable latitude in the matter of programming").

service area for the format being abandoned, (2) there is no substantial support for the endangered format as evidenced by an outcry of public protest, (3) the devotees of the endangered format are too few to be served by the available frequencies, or (4) the format is not financially viable. *See* text accompanying notes 5-9 *supra*. One or another of these factors is surely present is most format changes. And generally the existence *vel non* of these factors can be determined without the need for a hearing. The small remainder of cases are simply those in which the evidence strongly indicates that market mechanisms have not satisfied the Communications Act's mandate that radio serve the needs of all the people.

As we have observed in Part II *supra*, the Commission's administrative nightmare argument is seen to have little merit when it is remembered that only one of the handful of format cases reaching this court has resulted in a hearing. Also unpersuasive, in this regard, is the Commission's contention that *WEFM* mandates an unconstitutional, or at least statutorily proscribed, intrusion on licensee programing discretion. The Commission laid particular stress on the argument that licensees will be deterred from experimenting with unusual formats out of a fear of being locked in. But it has provided little or no evidence that *WEFM* has in fact deterred licensees' format choices; quite to the contrary, the Commission's staff study concluded that under the *WEFM* regime licensees have been aggressive in developing diverse entertainment formats.

Finally, we must emphasize the narrowness of the Commission's remedial powers. It merely has the power to take a station's format into consideration in deciding whether to grant certain applications. It has no authority under *WEFM* to interfere with licensee programing choices: it cannot restrain the broadcasting of any program, dictate adoption of a new format, force retention

of an existing format, or command provision of access to non-licensees. To say that it is empowered to impose censorship [35] or common carrier [36] obligations is to stretch *WEFM* virtually beyond recognition.[37]

---

[35] *See* Communications Act § 326, 47 U.S.C. § 326:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

This prohibition "has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties." FCC v. Pacifica Foundation, 98 S.Ct. 3026, 3033 (1978).

[36] *See* Communications Act § 3(h), 47 U.S.C. § 153(h), which provides in pertinent part that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

The central distinguishing characteristic of broadcast common carriers is that they must provide non-discriminatory public access to their facilities. FCC v. Midwest Video Corp., 47 U.S.L.W. 4335, 4338-4340 (Apr. 3, 1979); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 105-109 (1973). Nothing remotely resembling public access obligations is involved in the present case. Nor do we find persuasive the other asserted resemblances between *WEFM* and common carrier regulation: it neither obligates broadcasters to "continue in service," regulates the rates charged to advertisers, or prohibits unnecessary duplication of facilities.

[37] It is also argued by commercial broadcasters that *WEFM* contravenes § 310(d) of the Act, 47 U.S.C. § 310(d), which provides, in pertinent part, that in acting on transfer or assignment applications "the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." *WEFM* is said to violate this provision by

C.

The Commission would likely have been less concerned had it read our format cases more accurately; conversely, it would probably have better interpreted those cases had it viewed them more sympathetically. The flaws in its approach are intimately connected. They intersect in the Commission's failure to implement the cases so as to minimize their drawbacks while preserving their essence. Had it attempted to develop administrative standards instead of simply abdicating, it might well have discovered that many perceived "flaws" could be lessened or eliminated altogether.

The impetus for developing such standards must come, in the first instance, from the Commission. Only it, and not this court, has the expertise to formulate rules well-tailored to the intricacies of radio broadcasting, and the flexibility to adjust those rules to changing conditions. Only it has the opportunity to develop standards of general applicability outside an *ad hoc* adjudicatory context. And only it has the power to determine how to perform its regulatory function within the substantive and procedural bounds of applicable law.

---

requiring the Commission to compare the qualifications and operations of the assignor with those of the assignee.

This argument was not, however, relied on by the Commission in either of its actions reviewed herein. In any event, § 310(d) by its literal terms would not appear to forbid assignor-assignee comparisons because the license is not "transfer[red], assign[ed], or dispos[ed] of" when it is retained by the existing licensee. This is the position taken by the Commission itself. Wichita-Hutchinson Co., 20 F.C.C. 2d 584, 586 (1969) ("[t]he comparison prohibited by [§ 310(d)] is not between the transferor and the proposed transferee but between the proposed transferee and some third person other than the transferee proposed in the application.")

The Commission has not suffered from the want of suggestions along these lines. Scholars have noted that it could develop acceptable guidelines.[38] This court has emphasized the Commission's discretion to develop administrative standards,[39] and stressed that judicial review thereof will be limited and deferential.[40] The Commission itself has recognized the need for standard-setting. Commissioner Hooks, concurring in the *Notice of Inquiry*, suggested standards for the sympathetic implementation of *WEFM;*[41] and the Commission majority, in the same document, requested comments on administering the decision.[42] It is regrettable, from the present perspective, that rather than pursuing this approach the Commission chose simply to throw up its hands. While we cannot, of course, dictate what, if any, standards the Commission should adopt, the following suggests ways in which development of appropriate guidelines could satisfy many of its objectives.

---

[38] *See* D. Ginsburg, Regulation of Broadcasting 316 (1979); Note, *supra* note 28, at 436-37.

[39] *WEFM*, *supra*, 516 F.2d at 268 n.35; *id.* at 269 n.4 (Bazelon, C.J., concurring in the result); *Lakewood*, *supra*, 478 F.2d at 925 n.14 ("we have never attempted to set out specific guidelines for achieving the market-place ideal. The first, tentative steps into this complex area of regulation must be taken by the Commission"). *Cf.* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966) (suggesting that Commission can avoid administrative burdens of public intervention by formulating appropriate regulations by rulemaking).

[40] *Progressive Rock*, *supra*, 478 F.2d at 934; *Lakewood*, *supra*, 478 F.2d at 922. *Cf.* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1005-06 (D.C. Cir. 1966) (broad discretion to formulate rules governing public intervention).

[41] *See* note 15 *supra*.

[42] *See* note 14 *supra*.

One difficulty noted by the Commission and intervening commercial broadcasters is the alleged impossibility of classifying radio formats. They point to our statement that "we know [a format] when [we hear] it,"[43] as being overly subjective, and to some of the distinctions we have drawn between formats as being nice to the point of administrative infeasibility.[44] Yet these were the judgments of a court forced to decide the case before it by reference to the language of the Communications Act and the Congressional purpose informing it. The Commission, with its greater expertise and broad overview of the subject matter, could arrive by rulemaking at a format taxonomy which, even if imprecise at the margins, would be sustainable so long as not irrational.[45] The Commission "retains a discretion commensurate with its expertise to make reasonable categorical determinations," *WEFM*, *supra*, 506 F.2d at 265. Had it developed a rational classification schema in the first instance, this court would surely have given it great credence even if the results reached thereunder differed from those obtained by application of our own unguided analysis.[46]

---

[43] *Atlanta*, *supra*, 436 F.2d at 265 n.1, *quoting* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[44] *See WEFM*, *supra*, 506 F.2d at 265 n.28, 264-65 (suggesting distinctions between twentieth century and other classical music and between "fine arts" and "classical"); *Progressive Rock*, *supra*, 478 F.2d at 932 ("progressive rock" distinguished from "top forty").

[45] *Cf.* Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1053-1060 (D.C. Cir. 1978) (upholding EPA's classification of paper mills into sixteen categories for purpose of setting effluent limitations).

[46] *Cf.* National Ass'n of Indep. Television Producers and Distribs. v. FCC, 516 F.2d 526 (2d Cir. 1975) (upholding Commission's classification of television programs into "public affairs", "documentary" and "children's" as part of prime time access rule).

Indeed, the Commission used a format classification in its staff study to demonstrate the existence of broad diversity in major radio markets. There is a marked inconsistency in its endorsing the validity of a study largely premised on classifications it claims are impossible to make. In any case, the schema used in the staff study follows accepted industry usage and would appear facially rational. It is likely that the perceived administrative difficulties would be greatly reduced if the Commission were to adopt a similar approach.[47]

With regard to *WEFM*'s perceived intrusiveness, the Commission could set rigorous standards as to when petitioners to deny have established a prima facie case. It could, for example, require a relatively high level of public grumbling, could classify formats into broader rather than narrower categories, and could place the burden of demonstrating "uniqueness" on the petition-

[47] Furthermore, the Commission is not precluded from experimenting with more innovative approaches. It might consider, for example, dispensing altogether with the need for classifying formats by simply taking the existence of significant and bona fide listener protest as sufficient evidence that the station's endangered programing has certain unique features for which there are no ready substitutes in the service area. In other words, the Commission could dispense with the requirement that the endangered format be demonstrably "unique". This approach would obviate the need for "subjective" distinctions among formats and would respond, also, to the objection that listeners perceive important differences among stations programing the "same" format. And by concentrating on the existence of listener unrest, this approach would focus attention on the essentials of the format doctrine, namely, that when a significant sector of the populace is aggrieved by a planned programing change, this fact raises a legitimate question as to whether the proposed change is in the public interest.

ers.[48] To deal with the "lock in" problem it could exempt from the hearing requirement formats adopted experimentally and sought to be abandoned after a very short period of time.

In the analogous context of the fairness doctrine, the Commission has adopted stringent prima facie case requirements that weed out, at the outset, the great majority of complaints. We recently upheld, *en banc*, the Commission's dismissal of a fairness doctrine complaint based on those rigorous standards. *American Security Council Education Foundation v. FCC*, No. 77-1443 (D.C. Cir. 1979). We noted that the prima facie evidence requirement served to protect delicate First Amendment values by ensuring that robust, wide-open debate would not be deterred. Like the fairness doctrine, the format cases involve the Commission in an area charged with sensitive First Amendment implications. The Commission could surely use a similar technique in the format context for accommodating First Amendment values to the fact that broadcasters, under the scheme of the Communications Act, are public trustees obligated to serve the public interest.[49]

None of this is to imply, however, that the Commission is free to "administer" the format cases as a dead letter.[50] Whatever administrative means the Commission adopts must be capable of identifying and rectifying those infrequent situations in which market allocation *has* failed and in which the public interest would not be

[48] *Cf.* J.A. at 220 (comments of WNCN Listeners Guild) (suggesting that petitioning groups should have the burden of making out a prima facie case of uniqueness, although licensee should have burden of proof on the issue).

[49] *See* D. Ginsburg, *supra* note 38, at 316.

[50] *Cf.* Office of Communication of United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) (right of public to intervene in Commission proceedings cannot be vitiated by Commission's hostile attitude towards intervenors).

served by granting the assignment application. That is the basic message of our format change cases as to what Congress has willed in these situations, and it is one we reaffirm today.

IV

A.

Because the Commission devoted considerable energy to justifying its view of the proper relationship between court and agency, a few words on the subject are in order here. The Commission repeatedly referred to *WEFM* as representing the "policy" of the Court of Appeals, and contrasted it unfavorably with the "policy" of the Commission. It called upon this court, as its so-called "partner" in the regulatory process, to step back and recognize that its "policy" is superior to our own.

We should have thought that *WEFM* represents, not a *policy*, but rather the *law* of the land as enacted by Congress and interpreted by the Court of Appeals, and as it is to be administered by the Commission. This court has neither the expertise nor the constitutional authority to make "policy" as that word is commonly understood. *See National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943); *Action for Children's Television v. FCC*, 564 F.2d 458, 481-82 (D.C. Cir. 1977); *WEFM*, *supra*, 506 F.2d at 267-68. That role is reserved to the Congress, and, within the bounds of delegated authority, to the Commission. But in matters of interpreting the "law" the final say is constitutionally committed to the judiciary. *See International Brotherhood of Teamsters v. Daniel*, 99 S.Ct. 790, 800 & n.20 (1979); *SEC v. Sloan*, 436 U.S. 103, 118-19 (1978). Although the distinction between law and policy is never clearcut, it is nonetheless a touchstone of the proper relation between court and agency that we ignore at our peril.

WEFM was an interpretation of a statute applicable to an adjudicatory proceeding and, to this extent, was a decision in which the judicial word is final. That decision was based on an interpretation of the Communications Act. Moreover, although we did not explicitly address the constitutional implications of our decision, the constitutional issue was commented upon extensively by Chief Judge Bazelon in his opinion concurring in the result. Suffice it to say that we found no constitutional impediment to the decision as we understood it. As to these constitutional and statutory issues, it was the Commission's obligation to accept and carry out in good faith its legal duties as interpreted by this court.[51]

[51] The Commission's reliance on cases beginning with Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), is misplaced. In *Banzhaf* we affirmed the Commission's determination that cigarette commercials raised controversial issues of public importance and thus gave rise to fairness doctrine obligations for broadcasters who ran them. In subsequent cases this court followed the *Banzhaf* holding with respect to other types of product advertising. Retail Store Employees Union v. FCC, 436 F.2d 248 (D.C. Cir. 1970); Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971). The Commission then instituted a general reexamination of the fairness doctrine and concluded that it would no longer apply it to product advertising. Fairness Report, 48 F.C.C. 2d 1, 24 (1970). We affirmed the change of policy. National Citizens Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 98 S.Ct. 2820 (1978). The Commission argues that we should also permit it to change its mind in the present case and cease enforcing the format decisions.

There is, however, an important difference between when (1) we *uphold* an agency's interpretation of its governing statute and then review its contrary interpretation; and (2) we *reject* an agency's interpretation of its governing statute and then review its reaffirmation of its original interpretation. Because of the deference owed the Commission's construction of the Communications Act, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 121-22 (1973); Red

B.

Our legal judgments in the earlier cases, however, were grounded in certain factual premises, namely, that there is, in the traditional sense, no free market in radio broadcasting and that in certain circumstances, when there are persuasive indications that market allocation has broken down, the Commission had been given a useful role by Congress to play in ensuring that the benefits of radio accrue to all the people, not simply those favored by advertisers. The Commission, in its staff study appended to the *Policy Statement*, challenged those empirical assumptions. To the extent that the Commission was not questioning this court's legal judgment, but was attempting to demonstrate that faulty factual premises underlay that judgment, we agree that it was within its competence as an agency better equipped to develop legislative-type facts than is this court.

As we have noted, however, the Commission's use of the staff study was infected with the serious flaw that it

---

Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969), there is a fairly wide range of interpretations we would uphold on judicial review. In the product commercial cases, both the Commission's positions fell within this range and we were therefore able to uphold both. In the format cases, by contrast, we found from the start that the Commission's interpretation of the Act could not be sustained even when all due deference was given that construction. There is no reason for us to pay any greater deference to the Commission when it makes the same arguments in a subsequent proceeding.

Perhaps recognizing the force of this objection, the Commission attempts to place itself in the first category described above rather than the second: it implies that it originally agreed with the holdings of the format cases and only later determined to change its mind. This argument, however, is belied by the Commission's history of at least passive resistance to the format decisions in the name of licensee freedom. *See* notes 31-32 and accompanying text *supra*.

never even divulged the existence of the study, much less gave the participants the opportunity to comment thereon, before issuing its *Policy Statement*. This procedural unfairness, coupled with the substantive uncertainty flowing from the lack of adequate adversarial testing during the comment period, is enough to make us view skeptically the Commission's use of the study. But even if we were to accept the study on its own terms, we would not be persuaded.

The study consisted of two parts. In the first, the Commission staff compiled a chart showing which of 18 format types were available in the 25 largest radio markets. From this, the Commission argued that an adequate degree of diversity was currently being achieved by market forces. Second, the staff performed a statistical analysis of the relationship between the format type programmed by a station and its audience share as a rough measure of the degree to which stations programming the "same" format are considered by consumers to be close substitutes for one another. The staff found that the variation of audience shares within a given format was nearly as great as the variation among formats, and concluded that stations programing the same format were not necessarily close substitutes for one another. From this the Commission argued that it was not true, as we had supposed in *WEFM*, that abandonment of a unique format in favor of a format already present in the service area strongly indicated a loss in overall diversity.

The first part of the study, in our view, is completely consistent with *WEFM*. That case recognized that market allocation is generally an adequate guarantor of format diversity; it requires the Commission to step in only when there are persuasive indications that market allocation has failed in a particular case. *WEFM*, we repeat, was aimed not at the probable majority of cases in which the market operates adequately, but at those perhaps

infrequent cases in which it has not done the job. The study does not show that the market functions adequately in every instance.[52] Indeed, the Commission admits that market allocation is an imperfect reflection of audience preferences.

The second part of the staff study challenged the proposition that the Commission can—and must if it is to be faithful to the Act it administers—sometimes do a better job than the imperfect market. The Commission, as we have noted, viewed *WEFM* as mandating a system of pervasive governmental format allocation antithetical to the free market. If this were the meaning of *WEFM*, we would certainly agree that it could not improve on market allocation. But when it is recognized that *WEFM* contemplates governmental action as a supplement, not a substitute, for the market, and when attention is focused on cases of prima facie market breakdown, as in the

[52] It could be argued, in fact, that by examining only the nation's 25 largest radio markets (which presumably display the greatest degree of diversity) the staff presented a distorted picture of the extent of diversity in the country as a whole. We might also note that even in these major markets important formats are shown as unavailable in the listening area. For example, apparently no classical music service is provided in 7 of the 25 markets. *See* 60 F.C.C. 2d at 875-79. Conversely, the study shows a high degree of format duplication in the markets studied.

It is a useful corrective to focus, not on the broad range of cases in which the market functions accurately, but on those infrequent cases in which it appears that it has failed to promote diversity and that the Commission could remedy the defect. One need only think of the *Atlanta* case. Although 16% of the listeners preferred classical music, what was allegedly the only classical format was being abandoned in favor of music which was already programed by several of the 20 stations in the service area. In such a situation, it is evident that market forces may not be serving the public interest.

Atlanta case, it seems far more likely that the Commission could usefully play a limited corrective role.

Nor are we convinced by the study's statistical analysis. It is not surprising that one station, by dint of stronger signal, more pleasing announcers, better tempo, superior technical quality or other factors, should gain a much greater market share than another station programing the same format in the service area. What would be surprising, however, is if listeners, deprived of their favorite station, were indifferent as to whether they switched to another station programing the same format or to a different format altogether. The common sense of it is that most lovers of disco will switch to another disco station in preference to classical, all-news, country and western or the like. When a unique format is abandoned, those loyal to that format have no adequate substitute in the service area; when a non-unique format is eliminated, its listeners will generally have an adequate substitute in other stations programing the same format.[53] For this reason abandonment of a unique entertainment format raises the special public interest issue treated by our format cases.

Once again the court confronts a problem deriving, in the last analysis, from the common and undivided ownership of the airwaves by all of the people. In *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) and *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969), this court, in two vigorous opinions by Judge (now Chief Justice) Burger, dealt with a Commission reading of the Act that denied standing to oppose license

[53] We have also suggested, in note 47 *supra*, that the Commission could experiment with regulatory approaches responsive to the argument that listeners perceive important differences among stations programing the same format.

renewal to all except competing licensees claiming either electrical or economic interference. The first such opinion, at the instance of members of the listening public who wished to be heard on the asserted inadequacies of the licensee's programing, demolished that incredibly restrictive interpretation of the Act's "public interest, convenience, and necessity" standard. The second opinion overturned a rejection of the petition to deny after a hearing and decision on remand which it characterized as positively hostile to the complainants.

In *United Church of Christ*, as here, the Commission asserted all manner of difficulties with the interpretation of the statute pressed upon it by the protestants, including notably severe administrative burdens hampering the discharge of its regulatory responsibilities, if objections to format abandonment were required to be entertained and, where substantial, explored in evidentiary hearings. The Commission's *Policy Statement* in issue here is strongly reminiscent of the attitude displayed by it in *United Church of Christ*. The Commission, despite its parade of horribles in that case, has obviously survived.

In *WEFM* the court was at considerable pains to make clear that it was speaking solely in the context of the current regulatory scheme laid down by Congress. The result reached, we said,[54]

> cannot be otherwise when it is remembered that the radio channels are priceless properties in limited supply, owned by all of the people but for the use of which the licensees pay nothing. If the marketplace alone is to determine programming format, then different tastes among the totality of the owners may go ungratified. Congress, having made the essential decision to license at no charge for private operation as distinct from putting the channels up

[54] *WEFM*, *supra*, 506 F.2d at 268 n.34.

> for bids, can hardly be thought to have had so limited a concept of the aims of regulation. In any event, the language of the Act, by its terms and as read by the Supreme Court, is to the contrary.

There is much talk at the moment of deregulation in the communications field, particularly with respect to radio. Bills of varying sweep to this end are pending in the Congress,[55] and the enactment of at least one of them in its present form would appear largely to eliminate for the future the problem presented in the case before us.[56] But the movement towards regulation by the

[55] *See* H.R. 3333, 96th Cong., 1st Sess. (1979); S. 611, 96th Cong., 1st Sess. (1979); S. 622, 96th Cong., 1st Sess. (1979).

[56] The bill presently given the best change of passage, H.R. 3333, *supra* note 55, could well be read to make the present controversy moot. This would grant radio licenses for an indefinite period (*i.e.*, in perpetuity), *id.* § 471(a), and would allocate new or revoked radio licenses among competing applicants by a lottery system, *id.* § 415(d). It would still be necessary to make application for license assignment to the Commission, which must find that "the purposes of this Act will be served" thereby, *id.* § 421; the purposes of the bill, however, are stated to be that "the public interest is best served [by] marketplace forces, rather than government regulation . . . except that, where it has been determined that marketplace forces are deficient, the Congress finds that government regulation in the public interest is necessary and appropriate." *Id.* § 411.

S. 622, *supra* note 55, also promises to alter the statutory scheme so as to reduce or eliminate the present controversy. Like H.R. 3333, it would make radio license terms indefinite, *id.* § 332(a), and would allocate new licenses by lot, *id.* § 331. It recites a congressional finding that "marketplace competition can be the most efficient regulator of the provision of telecommunications services," *id.* § 2(a)(2), and would prohibit the Commission from requiring radio broadcasters to "adhere to a particular programing format," *id.* § 333(a)(1).

S. 611, *supra* note 54, adopts a more limited approach. It would grant radio licenses for an indefinite term, *id.* § 301(a),

marketplace appears to be accompanied by the exaction for the first time of charges for the use by licensees of the publicly-owned channels, and the benefits thereof would accrue equally to all members of the owning public.[57] This would be a vast and significant departure from the present system by reference to which we decide the question presently before us.

Looking to the Act in its present form, we hold the *Policy Statement* under review to be unavailing and of no force and effect.

It is so ordered.

but provides for annual Commission review of randomly selected stations to determine if their operations are consistent with the public interest, convenience and necessity, *id.* § 301(b).

[57] H.R. 3333, *supra* note 55, at § 414. S. 611, *supra* note 55, at § 106, would impose a much more moderate fee on radio broadcasters; and S. 622, *supra* note 55, at § 6, would charge a fee based only on the Commission's costs.

BAZELON, *Circuit Judge, concurring in vacating the decision*: I concur in vacating the decision of the FCC. The Commission's failure to make public the staff study that proved so central to its final decision violates fundamental rulemaking principles.[1] As the majority opinion documents,[2] the FCC exhibited an almost cavalier disregard for the public's right to comment on the critical data and methodology supporting the Commission's finding that "market forces had provided a significant even if not perfect amount of diversity."[3] This conclusion in turn is a vital link in the Commission's reasoning underlying its adoption of the *Policy Statement*. I believe therefore that the record must be reopened to permit meaningful public participation in the Commission's decision.

Because the Commission's procedural unfairness requires vacating the rule, I would not reach the merits of the FCC's interpretation of the public interest standard as applied to the abandonment of a so-called distinctive or unique format. But since the majority has precluded the FCC from adopting a rule contrary to the decision in *WEFM*, I feel compelled to note my agreement with much of Judge Tamm's thoughtful dissent. Implementing the public interest standard calls for a strong dose of policy judgment, a responsibility entrusted by Congress to the FCC.[4] Yet the majority virtually confines the

[1] "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of . . . data that, [in] critical degree, is known only to the agency." Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C.Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

[2] Majority op. at 17-21.

[3] FCC Br. at 18, *see* Memorandum Opinion and Order, 60 FCC 2d 858, 863 (1976).

[4] In National Citizens Committee for Broadcasting v. FCC, 555 F.2d 938 (D.C.Cir. 1977), *rev'd* 436 U.S. 775 (1978), a

FCC to a spectator's role in formulating policies that will promote and preserve diversity while minimizing the hazards of government intrusion into the content of broadcasting.

Even apart from this unwillingness to give appropriate deference to the Commission's judgment, I would remain troubled by the route taken by the majority. As I explained at some length in *WEFM*,[5] regulation of entertainment formats is not content neutral. The regulator is inevitably led to favor some forms of expression over others.[6] The majority acknowledges the "sensitive First Amendment implications"[7] of government oversight of format choice, but fails to grapple seriously with the constitutional implications of its decision.

I do not contend that there is a simple resolution to the conflict between fostering diversity, on the one hand,

---

panel of this court reversed the FCC's decision exempting roughly 90% of existing co-located broadcast newspaper combinations from a rule banning such cross-ownership. We concluded that, on the record developed by the FCC, the Commission had acted arbitrarily and capriciously by limiting divestiture to 16 "egregious" cases. The Supreme Court reversed, suggesting that we had not given sufficient deference to the Commission's judgment. *See* 436 U.S. at 810, 813-815. If we are directed to defer to the FCC's decision in *NCCB*, which seemed sharply at odds with the FCC's mandate, surely we should be hesitant to overturn the Commission's judgment here, where the Commission's accommodation of the conflicting policy interests is neither irrational nor wholly contrary to the purposes of the Communications Act.

[5] Citizens Committee to Save WEFM v. FCC, 506 F.2d 246, 276-81 (D.C.Cir. 1974) (Bazelon, C.J. concurring).

[6] This problem is not confined to regulation of format choices. *See, e.g.*, Brandywine-Main Line Radio Inc. v. FCC, 473 F.2d 16, 63 (D.C.Cir. 1972) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973).

[7] Majority op. at 40.

and protecting the media from chilling government interference on the other. The concerns I expressed in *WEFM* continue to plague efforts to regulate the airwaves in the public interest. Perhaps Congress will exercise its prerogative to cut this Gordian knot and free the choice of format from the bondage of government regulation.[8] Alternatively, the dawning technological revolution may eliminate this dilemma, by opening up an unprecedented number of accessible outlets for speech.[9] For the time being, however, the responsibility for reconciling these interests is lodged with the FCC and, to a limited extent, the courts. The record of fifty years of broadcast regulation suggests that the FCC's affirmative efforts to promote diversity have not only failed to achieve that goal, but have entangled the Commission and the courts in perilous government oversight of the content of expression. I cannot so easily reject the FCC's decision to turn away from this troubling experience and to cast its lot with the marketplace.

---

[8] As the majority notes, legislation proposing deregulation of radio is now pending before Congres. *See* majority op. at 50-51 & nn.54, 55.

[9] *See generally* Baer, *Telecommunications Technology in the 1980's*, in COMMUNICATIONS FOR TOMORROW POLICY PERSPECTIVES FOR THE 1980'S 61 (G. Robinson ed. 1978).

LEVENTHAL, *Circuit Judge*: I concur in Judge McGowan's excellent opinion for the court.

As sponsor of the court-agency partnership concept and "hard look" doctrine,[1] I add a few words to underscore his observation that this court does not view itself as cast in the role of policymaker.

The court explicitly acknowledges its responsibility not to treat the agency as "a hostile stranger," [2] or "with a hostile eye, like an 'intruder'." [3] In a working partnership, there may be differences between partners, but there is a mutuality of recognition and respect far removed from the approach taken with any stranger or intruder.

The relationship of court and agency emerges from the functions assigned by Congress to each. Congress has delegated to the agency, here the FCC, the function of making policy. It has given the court the role of review to ensure that an agency decision stays within the intent of the law, and satisfies the requirement of reasoned decisionmaking delineated in Justice Harlan's *Permian* opinion.[4]

---

[1] Greater Boston Television Corp. v. FCC, 143 U.S.App. D.C. 383, 392-95, 444 F.2d 841, 850-53 (1970), *cert. denied*, 403 U.S. 923 (1971); *see also, e.g.*, Niagara Mohawk Power Corp. v. FPC, 126 U.S.App.D.C. 376, 383 n.24, 379 F.2d 153, 160 n.24 (1967); Public Serv. Comm'n of N.Y. v. FPC, 167 U.S.App.D.C. 100, 117, 511 F.2d 338, 355 (1975).

These opinions rely, *inter alia*, on United States v. Morgan, 307 U.S. 183, 191 (1939); United States v. Morgan, 313 U.S. 409, 422 (1941); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 16-18 (1936); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION vii (1965).

[2] *Greater Boston*, *supra* note 1, 143 U.S.App.D.C. at 394, 444 F.2d at 852.

[3] Public Serv. Comm'n of N.Y. v. FPC, *supra* note 1, 167 U.S.App.D.C. at 117, 511 F.2d at 355.

[4] Permian Basin Area Rate Cases, 390 U.S. 747, 791-92 (1968).

If hostility to a result leads an agency systematically to distort the testimony of witnesses on material matters, a court could not conscientiously sustain the agency decision.[5] That is not unlike what the Commission has done in this case by distorting the meaning of our *WEFM* opinion,[6] a matter Judge McGowan develops with some care. The court-agency partnership depends on mutuality of respect and understanding.

A court must review an agency's action in terms of what the agency says it has considered.[7] We cannot say that what an agency says it relies on was really unimportant merely because its appellate counsel attempts some repair carpentry.[8]

---

[5] Universal Camera Corp. v. NLRB, 340 U.S. 474, 492-97 (1951).

[6] Citizens Committee to Save WEFM v. FCC, 165 U.S.App. D.C. 185, 506 F.2d 246 (1974) (en banc).

[7] SEC v. Chenery Corp. (Chenery I), 318 U.S. 80 (1943).

[8] FPC v. Texaco, Inc., 417 U.S. 380, 397 (1974); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-169 (1962).

TAMM, *Circuit Judge*, with whom MACKINNON, *Circuit Judge, concurs, dissenting*: I respectfully dissent. The majority's decision, I fear, usurps the proper role of the Federal Communications Commission (Commission) in the formulation of communications policy. In my view, the Commission's determination that application of *Citizens Committee to Save WEFM v. FCC (WEFM)*, 506 F.2d 246 (D.C. Cir. 1974) (en banc), will not measurably increase diversity of entertainment formats is neither arbitrary nor capricious. Although I understand the frustration of re-examining an issue purportedly resolved, I believe that the much touted agency-court partnership is well served by continuing dialogue between administrator and judge. I am persuaded that the Commission, which Congress has entrusted with the duty to regulate broadcasting in the public interest, has advanced a reasoned position which this court should uphold.

In *WEFM*, we decided that when an application to transfer a radio license involves a change in format, the Commission must determine whether the assignor's format is unique and financially viable.[1] If so, the Commission, when faced with substantial questions of fact and significant public opposition to the transfer, must conduct a hearing to discern whether loss of the format is in the public interest before acting upon the application.[2]

---

[1] The court noted that an assignor's asserted financial losses will only justify a format change when "those losses [are] attributable to the format itself." Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 262 (D.C. Cir. 1974) (en banc).

[2] 47 U.S.C. § 310(d) (1976) commands the Commission to decide whether an application to transfer a license would be in the public interest. *See also* 47 U.S.C. § 309(a) & (d) (1976).

The *WEFM* court based the hearing requirement on the "public interest in a diversity of broadcast formats."[3] The court warned that format diversity would not necessarily result from the unregulated play of market forces because broadcasters derive revenue from the sale of time to advertisers, not from the sale of programming to listeners. A station with a larger audience may sell more advertising time, and at higher rates, than a station with fewer listeners. A station with a smaller, but more demographically attractive audience may, however, sell as much or more time as the station with greater numbers of listeners. The court feared that the effect of demographics on the radio market would allow listeners with desirable demographic characteristics—typically eighteen- to thirty-year-olds with discretionary income—to exercise a disproportionate influence upon broadcast decisionmakers who choose formats. Because formats preferred by fewer younger people might prove financially more attractive than formats preferred by a greater number of older or lower income listeners, the court concluded that regulation was necessary to insure diversity. The court's reasoning implicitly suggests that regulation is unnecessary if the radio market reflects the desires of the greatest numbers of listeners.

The Commission responded to *WEFM* by instituting a proceeding designed to develop methods for implementing the court's ruling.[4] After reviewing comments of both broadcasters and public interest representatives, the Commission concluded that use of the *WEFM* doctrine would not demonstrably further the public interest.[5]

---

[3] Citizens Comm. to Save WEFM v. FCC, 506 F.2d at 262.

[4] *See* Notice of Inquiry, Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations (Notice of Inquiry), 57 F.C.C.2d 580 (1976).

[5] *See* Development of Policy re: Changes in Entertainment Formats of Broadcast Stations (Policy Statement), 60 F.C.C. 2d 858, 863-66 (1976).

The Commission did not premise its decision upon a rejection of the court's observation that the presence of demographic considerations might increase the influence of certain listeners.[6] Rather, the Commission first contended that the radio market produces diversity of formats. In support, the Commission presented a study of formats aired in major cities demonstrating "an almost bewildering array of diversity."[7]

Second, the Commission argued that administrative intervention in the format selection process could not be shown to further the public interest.[8] The Commission

[6] *Id.* at 863.

[7] *Id.* The Commission also argued that marketplace allocation accommodates rapidly shifting tastes without the necessity of governmental interference. *Id.* at 864.

[8] The Commission stated that determining whether a format change would serve the public interest involved three inquiries: "(1) what the station's existing format is; (2) whether there are any reasonable substitutes for that format in the station's market; (3) if there are not, whether the benefits accruing to the public from the format change outweigh the public detriment which the format abandonment would entail." *Id.* at 861-62. The Commission suggested that definition of a unique format would present an "acute practical problem." *Id.* at 862; *see* text at 5-6 *infra*. Addressing the third question, the Commission stated that it is impossible to determine whether consumers would be better off if a new format replaced a unique format. Policy Statement, 60 F.C.C. 2d at 862; *see* note 14 *infra*.

The Commission voiced two other notable concerns. First, it suggested that the *WEFM* doctrine may decrease experimentation in formats, because broadcasters would fear being "locked" into a unique format. *Id.* at 865. Second, the Commission thought that format regulation would chill broadcaster's first amendment rights. *Id.* Although I agree that the first amendment concerns are substantial, *see* Citizens Comm. to Save WEFM, 506 F.2d at 268 (Bazelon, C.J., concurring), I do not believe the issue need be reached to sustain the Commission's judgment.

contended that stations within a given format are not interchangeable to their respective audiences.[9] Simply stated, listeners of a particular station within a format category may not be equally willing to listen to any station within the same format category. The Commission's assumption suggests that, for example, in a two station market consisting of a top 40 format and a classical format, a second top 40 station might command a greater audience than the unique classical station.[10]

The majority does not dispute the possibility that more listeners may prefer a second top 40 station to a unique classical format. Rather, it suggests that retention of the classical format might be in the public interest because the desires of those preferring the second top 40 station can be easily satisfied by the first top 40 station. Classical tastes, to the contrary, would be less likely satisfied by a top 40 format. The majority explains:

> When a unique format is abandoned, those loyal to that format have no adequate substitute in the service area; when a non-unique format is eliminated, its listeners will generally have an adequate substitute in other stations programing the same format. For this reason abandonment of a unique entertainment format raises the special public interest issue by our format cases.[11]

[9] The Commission documented this reasonable assumption, *see* text at 5-6 *infra*, with a study of audience ratings for major radio markets showing that listener preferences are almost as varied within formats as among formats. The Commission concludes that formats of the same type are, therefore, not close substitutes for each other. Policy Statement, 60 F.C.C.2d at 863-64, 873-75.

[10] According to the majority opinion, the Commission may be called upon to review such a change in format when it considers applications either to transfer or to renew a license. *See* WNCN Listeners Guild v. FCC, No. 76-1692, slip op. at 22 (D.C. Cir. June 29, 1979) (en banc).

[11] *Id.* at 39 (footnote omitted).

Thus, the majority introduces a novel doctrine that calculates the public interest without necessary reference to the aural desires of the greatest number of listeners. The majority's approach is fraught with difficulties.

First, *WEFM* does not require use of the "substitution" theory. The *WEFM* court noted that the accuracy of listener preferences in the radio marketplace might be distorted by advertisers' quests for demographically desirable audiences. Any demographic effect on the market, however, is cured if the Commission can ascertain the numbers of people that desire different formats. I harbor serious doubts that regulation based on direct listener "votes" is practicable; but even if it is, the majority, in an effort to justify regulation that may preserve a format favored by fewer listeners than would prefer a changed format, advances the "substitution" principle. Although this theory marks a substantial departure from the reasoning of *WEFM*, the majority offers no independent support for the principle.

Second, use of the "substitution" theory assumes that "unique" formats can be adequately distinguished from "non-unique" formats. Former Commissioner Glen O. Robinson, in his concurring statement in *Notice of Inquiry*, 57 F.C.C.2d at 594-95, emphasized the enormity of this task:

> What makes one format unique makes all formats unique. If subjectivity is to be an important determinent of what makes a format "unique" (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. For example, in most large markets there are a number of middle-of-the-road formats which seem identical on any objective or quantifiable basis; yet they are far from interchangeable to their respective audiences. Indeed, if people did not distinguish among these stations, there would be no reason for them to co-exist—and little economic likelihood that they would. Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's "sound" and that citizens' groups (and, alas, appellate judges) call format. It follows, therefore, that by the subjective standards that the Court seems to embrace, any format is unique; from which it follows, all must be preserved. At that thought the mind swims and the heart sinks. (Footnotes omitted).

The majority does not explicitly concede the difficulty of classifying formats according to listener preference. Nevertheless, it suggests that the Commission may dispense with the requirement that an endangered format be demonstrably "unique" for purposes of ordering a hearing.[12] Although the majority's concession neatly sidesteps the difficulty of defining a "unique" format at the pre-hearing stage, it does nothing to ease the Commission's task once a hearing is held.

Third, the "substitution" theory assumes that it is possible for a federal regulatory agency to measure listener preferences in entertainment formats. I would have thought that the best judge of the most desirable entertainment formats is the listening audience itself. When sufficient numbers of top 40 listeners switch channels to patronize another station which, for purposes of federal regulation is also classified as top 40, they must want to hear a "sound" not previously offered. If consumers purchased radio programming, classical listeners could express a greater intensity of preference simply by paying more than top 40 listeners. Alternatively, if the top 40 listeners intensely preferred a second top 40

---

[12] *Id.* at 32 n.47.

station, they could respond by paying even more. Because radio broadcasting is a "zero price" good,[13] however, consumers cannot register their intensity of preference though a price system. "Substitution" as used by the majority is merely a crude device meant to measure the intensity of listener preference.

The "substitution" theory runs afoul of the familiar economic principle that it is either impossible or extremely difficult to compare the intensity of preference of different persons.[14] The range of audience preferences

---

[13] *See* R. NOLL, M. PECK & J. MCCOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 32-33 (1973).

[14] *See* R. POSNER, ECONOMIC ANALYSIS OF THE LAW 11 (2d ed. 1977); L. ROBBINS, AN ESSAY ON THE NATURE & SIGNIFICANCE OF ECONOMIC SCIENCE 138-41 (2d ed. 1940). The Commission stated that no economically rational basis exists for comparing intensity of preference among listeners:

> In theory preference should be given to that format which is of greater value to the consumers. Unfortunately, the Commission will find it impossible to measure the relative values of different formats because there exists no litmus or *a priori* way of measuring how much particular formats are worth to the audiences. All that can be known is simply how many people listen to available programs.
>
> Unfortunately, the size of a station's audience is not necessarily an appropriate measuring stick of the degree of satisfaction which listeners derive from its programming. That is, two different formats which attract audiences of equal size may not be of equal value. Preferences expressed by the audience of one format may be much stronger than preferences for the other, in which case the former should be the more valuable. In order to ascertain which format is the more valuable, one would have to know the intensity of demand for each. Again, there exists no acceptable, reliable way of measuring aspects of these consumer preferences because consumers

within the same format, for example, suggests that the Commission would be hard pressed to determine how much and how many listeners would prefer a variation of a pre-existing format to a unique format. Given the many aspects of a specific station's "sound," it is difficult to measure the amount or the depth of audience acceptance of a changed format without allowing broadcast of the new format—a solution which eradicates the controversy.

Finally, the majority's "substitution" theory assumes that the Commission will be able to balance number of listeners against intensity of format preference. Consider the top 40/classical format hypothetical. If twenty percent of the listening audience would mildly prefer a second top 40 format and five percent would vigorously prefer retention of the classical format, does the size of one audience outweigh the intensity of preference of the other? The majority opinion offers no clue.

In sum, the majority's opinion presents an unjustified rebuttal to the Commission's conclusion that the public interest may not be discernibly furthered by implementation of the *WEFM* doctrine. The majority has not explained how to decide whether a specific format is unique, how to measure the number of listeners who favor a changed format, or how to compare the intensity of preference between listeners who desire retention of a unique format and those who prefer a variation of a pre-existing format. Finally, the majority has failed to identify the principle within the Communications Act

---

> are not required to pay for the opportunity to listen to radio.

Policy Statement, 60 F.C.C.2d at 873; *see* Bruce M. Owens, "Radio Station Format Changes, Diversity and Consumer Welfare," Appendix to Brief for National Association of Broadcasters.

that mandates regulation favoring the interests of fewer listeners over the interests of more listeners.

I am also troubled by another aspect of the majority opinion. The majority notes that petitioners allege that they did not have an adequate opportunity to comment on two studies relied upon by the Commission. The majority explicitly declines to "decide whether the failure to obtain public comment on the study is itself of sufficient gravity to warrant rejection of the *Policy Statement*," [15] although it says that this "procedural unfairness, coupled with the substantive uncertainty flowing from the lack of adequate adversarial testing during the comment period, is enough to make us view skeptically the Commission's use of the study." [16] On the assumption that the former statement clearly asserts that the majority opinion does not rest upon a procedural ground, I have directed the thrust of these dissenting remarks to the substantive validity of the Commission's decision.

I note in passing, however, that the two statements taken together may be read as suggesting that the alleged procedural unfairness was not serious enough to require a remand to the agency, yet was serious enough to allow the majority to subject the agency to unusually strict scrutiny. In my view, if the majority believes that the Commission has committed procedural error sufficient to alter the normal standard of review of administrative decisions, then a remand to the Commission is proper.[17]

[15] WNCN Listeners Guild v. FCC, No. 76-1692, slip op. at 19 n.24.

[16] *Id.* at 37.

[17] *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *see also* South Prairie Constr. Co. v. Operating Eng'rs, 425 U.S. 800, 805-06 (1976); NLRB v. Food Store Employees, 417 U.S. 1, 9-10 (1974); FPC v. Idaho Power Co., 344 U.S. 17, 22 (1952).

A remand would afford the petitioners greater opportunity to comment upon the studies, offer the Commission the opportunity to build a better record for review, and allow this court to meet the Commission's contentions head on.

More important than the specifics of the current debate, is the lack of deference the majority accords the Commission's assessment of market conditions. Although the majority acknowledges the expertise of the Commission to challenge the factual premises that underly the *WEFM* decision,[18] it mounts untested assumption upon untested assumption to create a theory of regulation that may bear little resemblance to the actual functioning of the broadcast market. Only the Commission, equipped with investigatory tools and a well of experience, may predict in the first instance the behavior of listeners and broadcasters. The majority has simply substituted its views for the Commission's.

The Supreme Court has often reminded this court of the appropriate relationship between administrative agency and reviewing court. Only last year, the Court, reversing our finding that the Commission had acted improperly in "grandfathering" certain newspaper-broadcast station combinations, noted that the Commission's decision to adopt a general policy of prospective divestiture was primarily judgmental or predictive. "In such circumstances, complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978) (*quoting FPC v. Transcontinental Gas*

[18] WNCN Listeners Guild v. FCC, No. 76-1692, slip op. at 36.

Pipe Line Corp., 365 U.S. 1, 29 (1961)). In the present case, the majority disregards the Commission's expert knowledge and, in so doing, violates the mandate of *FCC v. National Citizens Committee for Broadcasting.*

The majority has lost sight of our role as a reviewing court whose proper function is to uphold an agency's reasonable judgment. The Commission's determination that use of the *WEFM* doctrine will not further the public interest is well within the parameters of reason. Faced with a conflict between judicial and administrative policies,[19] I believe we are obliged to uphold the Commission. The court's decision today, a reversal based on unverified factual assumptions about listener preferences and behavior, extends judicial review of administrative policy-making processes beyond its permissible bounds.[20]

---

[19] The majority argues vigorously that *WEFM* is *"law"* and not *"policy." See id.* at 34. Of course, it is both. The Commission has not asserted that it is free to disregard the mandate of *WEFM*, it simply suggests that the definition of the public interest put forth in that decision is neither the only possible nor the preferable formulation. The majority concedes, as it must, that the public interest standard may subsume different, even opposing, policies. *Id.* at 35 n.51. *Compare* National Citizens Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) *with* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). Although the Commission's proposal closely tracks an interpretation we have previously rejected, the agency has now presented more persuasive reasons why its view should be upheld. For what purpose is the agency-court partnership if we cannot maintain an open mind?

[20] *See* Polsby, *F.C.C. v. National Citizens Committee for Broadcasting and the Judicious Uses of Administrative Discretion*, THE SUP. CT. REV. 1, 17-22 (1979).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

[Filed Jun. 29, 1979]

No. 76-1692

WNCN LISTENERS GUILD and CITIZENS COMMUNICATION CENTER, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC., NATIONAL ASSOCIATION OF BROADCASTERS, INTERVENORS

No. 76-1793

CLASSICAL RADIO FOR CONNECTICUT, INC., and COMMITTEE FOR COMMUNITY ACCESS, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL ASSOCIATION OF BROADCASTERS, CORNHUSKER TELEVISION CORP., ET AL., INTERVENORS

No. 77-1951

THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

METROMEDIA, INC., NATIONAL RADIO BROADCASTERS ASSOCIATION, NATIONAL BROADCASTING COMPANY, INC., CBS, INC., INTERVENORS

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

JUDGMENT

This cause came on to be heard on petitions for review of orders of the Federal Communications Commission; briefs were filed by the parties; and the case was argued before the Court sitting *en banc*. On consideration thereof, it is

ORDERED AND ADJUDGED, by the Court, *en banc*, that the Memorandum Opinion and Order of the Federal Communications Commission on review

herein (60 F.C.C. 2d 858) is vacated, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 29, 1979

Opinion for the Court, concurred in by Chief Judge Wright, and Circuit Judges Leventhal, Robinson, Robb, and Wilkey, filed by Circuit Judge McGowan.

Concurring opinions filed by Circuit Judges Bazelon and Leventhal.

Dissenting opinion filed by Circuit Judge Tamm. Circuit Judge MacKinnon joins in Circuit Judge Tamm's dissenting opinion.

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Docket No. 20682

IN THE MATTER OF
DEVELOPMENT OF POLICY RE: CHANGES IN THE
ENTERTAINMENT FORMATS OF BROADCAST STATIONS

NOTICE OF INQUIRY

(Adopted: December 22, 1975;

Released: January 19, 1976)

BY THE COMMISSION: CHAIRMAN WILEY ISSUING A STATEMENT; COMMISSIONERS HOOKS AND ROBINSON CONCURRING AND ISSUING STATEMENTS.

1. The Commission has under consideration its policies and practices with respect to changes in the entertainment formats of broadcast stations.

2. The need for this proceeding arises in view of the rulings in several recent entertainment format change cases, including *Citizens Committee To Save WEFM, Inc.* v. *Federal Communications Commission*, 506 F.2d 246 (1974). This case arose out of an application by Zenith Radio Corporation, licensee of Station WEFM, Chicago, Illinois, to assign its broadcast license to GCC Communications of Chicago, Inc. [hereinafter GCC] pursuant to 47 U.S.C. 310(d),

and the accompanying proposal by GCC to change the format of the station from classical music to popular, or rock and roll.

3. In response to a petition to deny the application, filed pursuant to Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. 309 (d), the Commission found that since there were two other stations serving the Chicago area with a classical music program format, the public interest in diversity of broadcast entertainment formats was not sufficient to override the legitimate protections accorded broadcast licensees by the Communications Act and the First Amendment from Government intrusions into their program content judgments. *Zenith Radio Corporation*, 38 FCC 2d 838, *reconsideration denied* 40 FCC 2d 223 (1973). Appended to Commission's decision on reconsideration approving the assignment applications was a separate opinion, entitled "Additional Views of Chairman Burch," which was joined by all but one Commisioner. These "Additional Views" explained the underlying analysis on which the Commission's decision was based.

4. Specifically, the six Commissioners pointed to the Supreme Court's decision in *Federal Commuications Commision* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940), that "[t]he regulatory responsibility of the Commission in the broadcast field essentially involves the maintenance of a balance between the preservation of a free competitive broadcast system, on the one hand, and the reasonable restriction of that freedom inherent in the public in-

terest standard provided in the Communications Act, on the other." The Commissioners went on:

> The Commission has struck this balance by requiring licensees to conduct formal surveys to ascertain the need for certain types of non-entertainment programming, while allowing licensees wide discretion in the area of entertainment programming. Thus with respect to the provision of news, public affairs and other informational services to the community, we have required that broadcasters conduct thorough surveys designed to assure familiarity with community problems and then develop programming responsive to those identified needs. [footnote omitted] In contrast, we have generally left entertainment programming decisions to the licensee or applicant's judgment and competitive marketplace forces. As the Commission stated in its *Programming Policy Statement*, 25 Fed. Reg. 7293 (1960), "[o]ur view has been that the station's entertainment format is a matter best left to the discretion of the licensee or applicants, since as a matter of public acceptance and of economic necessity he will tend to program to meet the preference of his area and fill whatever void is left by the programming of other stations."

5. The Commissioners also stated that this discretion allowed broadcasters by the Commission's policy permitted experimentation in program formats that would be seriously inhibited by a policy of further Government intrusion into programming judgments which would have the undesirable effect of "locking"

broadcasters to the present formats. "[I]nhibiting licensee discretion to change or modify unsuccessful program formats appealing to minority tastes will have . . . the effect of lessening the likelihood that such programming will be attempted in the first place." However, it was emphasized by the Commission that the discretion accorded broadcasters was not "unbridled," but must be exercised in a manner consistent with the licensee's public obligations. The Commission therefore resolved to take an "extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming." It was further explained that whenever facts "indicate that the [proposed new] format is not reasonably attuned to community tastes or that the format change will eliminate a service to the public not otherwise available, a survey of entertainment tastes or a hearing may be required."

6. In applying this considered policy to the proposed change of WEFM's format, the Commission found that since there was no substantial dispute as to either the existence of classical music programming on other stations serving the area, or that the proposed new format would be reasonably attuned to community tastes, a hearing would serve no useful purpose and that grant of the application to assign the station's license would serve the public interest. The Court of Appeals *en banc*, however, set aside the Commission's orders.

7. The court, after reviewing the cases, beginning in 1970, in which it had considered format changes,[1] summarized the teaching of these earlier decisions as follows:

> There is a public interest in a diversity of broadcast entertainment formats. The disappearance of a distinctive format may deprive a significant segment of the public of the benefits of radio, at least at their first-preference level. When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the assignment, which may, if there are substantial questions of fact or inadequate data in the application or other officially noticeable materials, necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest. Finally, it is not sufficient justification for approving the application that the assignor has asserted financial losses in providing the special format; those losses must be attributable to the format itself in order logically to support an assignment that occasions a loss of the format.

[1] See *Citizens Committee to Keep Progressive Rock* v. *FCC*, 156 U.S. App. D.C. 16, 478 F.2d 926 (1973); *Lakewood Broadcasting Service, Inc.* v. *FCC*, 156 U.S. App. D.C. 9, 478 F.2d 919 (1973). *Hartford Communications Committee* v. *FCC*, 151 U.S. App. D.C. 354, 467 F.2d 408 (1972); *Citizens Committee to Preserve the Present Programming of WONO(FM)* v. *FCC*, No. 71-1336 (D.C. Cir.) (Order May 13, 1971); *Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-FM)* v. *FCC*, 141 U.S. App. D.C. 109, 436 F.2d 263 (1970).

8. The question of changes in the entertainment formats of broadcast stations presents two important questions, namely:

(1) Whether the public interest standard of the Communications Act of 1934, as amended, requires close scrutiny of broadcast entertainment formats to assure an appropriate diversity? and,

(2) Whether the First Amendment to the Constitution permits the close scrutiny of broadcast program content judgments suggested by the Court of Appeals?

9. We are deeply concerned that, by rejecting the programming choices of individual broadcasters in favor of a system of pervasive governmental regulation, the Commission would embark on a course which may have serious adverse consequences for the public interest. At the same time, we are concerned that such a course may involve an overly optimistic view of what can realistically be achieved through government regulation.

10. The Court, in WEFM, holds that there is "no longer any room for doubt that, if the FCC is to pursue the public interest, it may not at the same time be able to pursue a policy of free competition." By way of explanation, the Court added:

There is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time. More time may be sold, and at higher rates, by a station that has a larger or a demographically more desirable audience for advertisers.

11. The Commission acknowledges the force of the Court's point, that it would be factually erroneous to assert that the market forces which operate on radio stations are identical with the forces which produce the preference hierarchies of the members of the community of license. But implicit in that observation is the notion that the Commission, if it tries hard enough, can come up with a meter of collective welfare which is superior to the advertisers' marketplace. There are excellent reasons for supporting, however, that the search for the public interest in entertainment formats may be a difficult and ultimately futile exercise. See, generally, K. Arrow, *Social Choice and Individual Values* (1951).

12. *Broadcast Yearbook* lists upwards of eighty entertainment formats used by American radio stations. Excluding those with a small number of listed stations, there appear to be about a dozen principal formats: black ("soul"), country and western, classical, easy listening, educational, middle-of-the-road, progressive, religious (gospel), rock, spanish, top-40, talk, variety. These principal formats, together with a soupchon of minority formats, form the entertain-

ment programming for the two dozen or so aural services that may be audited in a medium-large market. Under the Court's mandate, a problem could arise in determining whether an identified format such as classical music, may have clearly delineated "sub-formats." [2] Moreover, the labeling of formats is a subjective matter and similarly labeled ones may in fact differ, while differently labeled one may in fact substantially overlap. Distinctions in this field are extremely hazy and subjective. The definition and identification of formats requires a composite analysis of the various elements of program service and listener perceptions of the station's overall programming. We question therefore whether it is appropriate or productive for an administrative agency to enter this quagmire in the absence of a compelling public interest need.

13. Our traditional view has been that the station's entertainment format is a matter best left to the discretion of the licensee or applicant, since he

---

[2] In the court's view, the Commission may have to go so far as to consider that, "[o]ne station might not, for example, play music composed in this century, while another might concentrate on twentieth century works." In his dissent, Judge MacKinnon pointed out his concern (as well as ours) with the danger of Government intrusion "when we are forced to draw a distinction based on differences between 'classical' music. . . ." As stated in *Times Film Corp.* v. *Chicago*, 5 L. Ed. 403, 425-26 (1961), "[i]t is not for the government to pick and choose according to the standards of any religious, political or philosophical group." A line between these extremes and one requiring the Commission to involve itself in determining musical formats—or the differences in such formats—is a difficult one to draw.

will tend to program to meet certain preferences of the area and fill significant voids which are left by the programming of other stations. The Commission's accumulated experience indicates that licensees frequently shift and modify their entertainment formats in response to changing listening tastes, competition, and financial necessity. Frequently, when a station changes its format, other stations in the area adjust or change their formats in an effort to secure the listenership of the discontinued format. This view has been borne out in two previous format change cases in which the "gap" left by Commission approval of a change of format was quickly filled by another station serving the same area. See *Lakewood Broadcasting Service* v. *FCC*, 156 U.S. App. D.C. 9, 14n.10, 478 F.2d 919, 924 n.10 (1973), *Citizens Committee to Keep Progressive Rock* v. *FCC*, 156 U.S. App. D.C. 16, 22n.16, 478 F.2d 926, 932n.16 (1973). We do not pretend that such an approach results in a perfect accommodation of "all major aspects of contemporary culture" (*WGKA*, *supra* at 269). It has, however, in our view, resulted in a wide diversity of entertainment formats. See, *e.g.*, Appendix A.

14. A contrary policy may well disserve the public interest. Its most logical and probable result may be, we believe, to discourage broadcasters from selecting an entertainment programming which is "unique or otherwise serves a specialized audience that would feel its loss." Such broadcasters would fear themselves "locked in" to a format. Unable to extricate themselves from the unsuccessful format without facing the prospect of a costly and time-consuming hearing,

broadcasters may not try new and innovative programming. This set of circumstances may have a tendency to result in conformity. Rather than attempting innovative programming, with the prospect of costly hearings and/or appellate review proceedings, and with a valuable franchise in jeopardy, the average broadcaster will stand pat. This inhibition of licensee discretion to change or modify formats to appeal to minority taste may well diminish rather than expand diversity.

15. Over the years, the Commission has sought to avoid dubious intrusions into the broadcaster's programming judgments. As a matter of policy, the Commission has permitted musical entertainment format changes as the marketplace might dictate. Now, however, the policy suggested by the Court of Appeals seems to require a much closer scrutiny of proposed changes in the programming decisions of broadcasters. We seriously question whether, under the Act's public interest standard, such close scrutiny is necessary or appropriate. In short, we are concerned that the course charted by the Court may lead only to expense, delay and stagnation, with no assurance that a decision finally reached by the Commission would be in any sense superior to (or more in the public interest than) that favored by the marketplace. For this reason, we are instituting this inquiry to examine whether the Commission should play any role in dictating the selection of entertainment formats. Parties who favor some degree of government involvement are asked to address the following questions:

(a) When should the Commission become involved in format changes—i.e., in all cases or only those where there is a significant public outcry? See *Citizens Committee to Keep Progressive Rock, supra* at 934. Also, how do you determine significant public outcry?

(b) Should the Commission attempt to categorize entertainment formats and, if so, on what basis?

(c) Other than a general objection to a proposed change in entertainment format, what burdens should be placed on members of the public to demonstrate that a unique format is being abandoned?

(d) If an applicant proposes to change from an alleged unique format, what showing is necessary to justify the proposed change? Also, if financial hardship is alleged, what showing should be submitted by an applicant justifying the losses?

(e) In cases of an alleged unique format, what consideration should be given to factors such as: (i) the similarity of other formats in the market; (ii) the population and areas served by broadcast facilities; (iii) the audience of the respective stations; (iv) the hours of operation, type of service (*e.g.*, AM, FM, educational), and the like? Further, in hearing cases involving alleged unique formats, what should be the burdens of the respective parties?

(f) If an applicant proposes to change from one unique format to another, should a hearing be held to determine which will better serve the public interest?

(g) Should the Commission consider a change from an alleged unique format only when the station is being sold, at license renewal time, or at other times?

(h) Is the maximization of program diversity necessarily in the public interest? That is, does the maximization of entertainment formats necessarily result in the maximization of consumer satisfaction?

16. Additionally, we invite interested parties to address the First Amendment ramifications of the policy suggested by the Court of Appeals. While the Supreme Court has aproved some FCC oversight of programming, it is evident that our authority in this area is not unlimited. Indeed, as noted in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 396 (1969), some regulations, such as a "refusal to permit the broadcaster to carry a particular program," would raise serious First Amendment issues.

17. It is, of course, difficult to contest the proposition that the "disappearance of a distinctive format may deprive a significant segment of the public of the benefits of radio, at least at their first preference level," as stated in *WEFM*. As suggested in *United States* v. *CIO*, 335 U.S. 106 (1948), however, any administrative regulation or policy tending to constrain an applicant from selecting programming of its

choice "must be justified by the existence and immediate impendency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions."

18. The First Amendment, of all areas of constitutional law, is an area where intrusions are most assiduously to be avoided. For over 40 years, therefore, broadcast applicants have been free to select their own programming formats. Obviously the broadcaster's determination as to whether to select one format over another is based on its own evaluation of the market. As noted elsewhere herein, leaving such choices to the applicant has nonetheless resulted in a wide diversity of entertainment formats. In the present controversy, we are being called upon to substitute our judgment for that of the applicant on the most subjective grounds imaginable without any clear danger to the public interest. In his concurring opinion in *WEFM*, Judge Bazelon stated his concern—and ours—with the fact that the Court had set a "broad view of the Commission's authority in the delicate area of programming with nary a syllable spoken to the First Amendment implications of its decision." We believe that this issue warrants a prompt and thorough review and, accordingly, such comments are requested. Specifically, would any system of Commission intervention in, or selection of, licensee entertainment formats violate the First Amendment?

19. This action is taken, pursuant to Section 403 of the Communications Act of 1934, as amended. In-

terested parties responding to this Notice of Inquiry may file comments on or before February 19, 1976. Reply comments may be filed on or before March 3, 1976. An original and eleven copies of each formal response must be filed in accordance with the provisions of Sections 1.49 and 1.51 of the Commission's Rules. However, in an effort to obtain the widest possible response to this proceeding from licensees and members of the public, informal comments (without extra copies) will be accepted. Copies of all pleadings filed in this matter will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

FORMAT TYPE	MARKETS			
	New York	Los Angeles	Chicago	Total
1. Agriculture & Farm	0	0	0	0
2. Beautiful Music	1	5	8	14 (8%)
3. Black	3	6	5	14 (8%)
4. Classical	3	2	2	7 (4%)
5. Contemporary	5	9	6	20 (12%)
6. Country & Western	1	5	5	11 (7%)
7. Ethnic/Foreign Language (Except Spanish)	1	1	4	6 (4%)
8. Golden Oldies	1	2	1	4 (2%)
9. Middle-of-the-Road	9	11	15	35 (21%)
10. News	2	2	3	7 (4%)
11. Progressive (Rock)	2	1	5	8 (5%)
12. Public Affairs	2	0	0	2 (1%)
13. Religious	2	4	0	6 (4%)
14. Rock	2	2	3	7 (4%)
15. Spanish	2	2	2	6 (4%)
16. Talk	3	2	0	5 (3%)
17. Top 40	2	3	0	5 (3%)
18. Varied	2	1	5	8 (5%)
19. Other	0	1	0	1 (1%)
Total Stations	43	59	64	166 (100%)
Number of Separate Formats	17	17	13	

SEPARATE STATEMENT OF
CHAIRMAN RICHARD E. WILEY

In Re

Notice of Inquiry in the Entertainment Formats of Broadcast Stations

(Docket 20682)

The Court of Appeals, in *Citizens Committee to Save WEFM* v. *FCC*, 506 F. 2d 46 (D.C. Cir. 1974), states that the public interest cannot be served adequately by a policy of free competition in the selection of entertainment formats. The Court, it appears, believes that FCC Commissioners are capable of doing

a better job of distributing formats than that presently performed by the marketplace. While I appreciate this judicial vote of confidence in our ability and expertise, I cannot honestly say that I share the Court's optimism. Indeed, I am concerned that FCC involvement in this area will result in extensive regulatory delay and will inhibit innovation and flexibility in the development of formats. Even after all relevant facts have been fully explored in an evidentiary hearing, we would have no assurance that a decision finally reached by our agency would contribute more to listener satisfaction than the result favored by station management.

Based on the arguments I have heard to date, I do not believe that there is any objective or principled ground for agency decision-making in the format area. The Court of Appeals recognized the subjectivity involved in identifying a "unique" format, but seems to suggest that we should "know it when [we hear] it." *Citizens Committee to Preserve WGKA*, v. *FCC*, 436 F. 2d 263, 265 n. 1 (D.C. Cir. 1970). I find it difficult to square this standard with the usual requirement that agencies have a reasoned explanation for their decisions—and with the time-honored principle that the broadcast licensee has "both initial responsibility and primary responsibility" in programming matters and that "it has wide discretion and latitude that must be respected even though, under the same facts, the agency would reach a contrary conclusion." *National Broadcasting Co.* v. *FCC*, 516 F. 2d 1101, 1118 (D.C. Cir. 1974 (opinion of Judge Leventhal).

It would be reasonable, of course, to state that every station is unique in the literal sense of that term; each provides a particular attraction to the people who prefer it to other stations and each contributes in some measure to format diversity. If we were to deal with the problem only in this literal fashion, we would never have occasion to bar a change of format—for the loss to diversity caused by the change would be offset by a corresponding gain (represented by the new format). But, while the Court asks us to draw fine distinctions among similar entertainment services (even to the point of distinguishing classical stations specializing in "twentieth century works" from those concentrating on the older classic), I do not understand it to be emphasizing the unique format in this strict sense. It appears, therefore, that we are called upon to judge whether an existing format contributes *more* to diversity than a proposed format would. While we are not offered any yardstick by which to measure degrees of diversity, it seems that we are expected to use our best efforts to discourage stations from competing with each other in catering to popular tastes.

Under this system, a station which was permitted to continue a successful format would benefit considerably from what would be, in effect, a government-managed cartel. This station, being protected against competitive entry, might enjoy profits considerably in excess of those it could earn in an open market. I seriously doubt, however, that the many citizens who listen to this format would share the station's

enthusiasm for the FCC's benevolent regulation. Unless we have abandoned all faith in a free economy, we must assume that the public will benefit from a competitive struggle and even from the potential competition made possible by a policy of open entry.

I do not imagine that a competitive system will achieve perfection or accommodate every possible minority taste. However, it seems to be the only means of preserving an essential flexibility in radio broadcasting and it will free the FCC from the fruitless task of adjudicating endless and bitter disputes among broadcasters (who would otherwise be forced to turn to the government, rather than the public, in their quest for business advantages).

Concurring Statement of Commissioner Benjamin L. Hooks

In Re: Changes in Entertainment Formats of Broadcast Stations

The matter of Commission intercession in entertainment program formats is, indeed, vexation. Our indisposition to issue programming directives out of Washington is bred by our historic alignment with the ideal of a media free of government influence. With respect to the broadcast media, a publicly regulated resource, the line between "saying too much and saying too little" [1] is not solid; it is mostly amorphous and pursues a rambling road.

---

[1] "[I]n applying the public interest standard to programming, the Commission walks a tightrope between saying

Ever since the *Voice of the Arts* case [2] where we were instructed by the court to look into any abandonment of a unique format which was opposed by significant numbers in the community, the Commission has uncomfortably juggled this problem. To date, we have no comprehensive policy with which to map our approach, progress, or final destination. The Commission, therefore, has wisely instituted this proceeding to explore the territory.

I was one of those who joined former Chairman Dean Burch's statement in *WEFM* wherein we expressed a natural dread of becoming too deeply enmeshed in format choices.[3] But, after reading again

---

too much and saying too little. In most cases it has resolved this dilemma by imposing only general affirmative duties—e.g., to strike a balance between various interests of the community, or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues. The licensee has broad discretion in giving specific content to these duties. . . . Given its long-established authority to consider program content, this approach probably minimizes the dangers of censorship or pervasive supervision."

Banzhaf v. *FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968), cert. denied, *sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969).

[2] *Citizens Committee to Preserve the Voice of the Arts in Atlanta* v. *FCC*, 436 F.2d 263 (D.C. Cir. 1970).

[3] *Zenith Radio Corporation*, 40 FCC 2d 223 at 230 (1973). Even there, however, we noted:

> This is not to say, however, that licensees or applicants have unbridled discretion in selecting their entertainment formats. The Commission will take an extra hard look at the reasonableness of any proposal which would

the decisions in the so-called "format cases," [4] and, however loathe we personally may be to lay hands on the format porcupine, the final responsibility of assuring service to all segments of the community may ineluctably abide here.

Moreover, tangential involvement in program categories would not be wholly precedential. In our 1960 *En Banc Programming Inquiry*, 20 P & F Radio Reg. 1901 (1960), we set forth fourteen specific categories of programming we deemed essential to satisfy the public's varied interests. We have long held that minorities must be served. And, more recently, we have decreed the need for a special programming effort to serve children, going so far as to declare that a station must provide "a reasonable amount of programming which is designed to educate and inform —and not simply to entertain." [5]

With specific reference to format categories, I have stated:

> [A]s a regulator, I must be equally aware that the Commission's statutory duty to ensure that licensees operate in the public interest carries

---

deprive a commuunity of its only source of a particular type of programming.

Id. at 231.

[4] *See Majority Order*, at p. 3, n. 1.

[5] *Children's Television Report and Policy Statement*, 50 FCC 2d 1, 6 (1974). In that same *Report* we repeated: "As we have long recognized, broadcasters have a duty to serve all substantial and important groups in their communities. . . ."

Id. at 5.

> with it an obligation to see that substantial segments of the community are not subject to a total blackout of programming attuned to their special needs and interests. To permit a situation in which, hypothetically, every station in a given locale could program identically so as to optimize audience size—whether the preferred programming be all-classical, middle-of-the-road, two-way talk, etc.—would be to countenance the same kind of improper exclusion that minorities suffered during the earlier days of the media, of which unfortunate vestiges remain today.[6]

I remain of that mind and hope that, rather than ducking, we use this proceeding to meet the problem of blanket deprivation head on.

Without intending oversimplification, the issue here settles neither on free speech nor on a free market.[7]

---

[6] *Dissenting Statement of Com'r Hooks*, Assignment of WQFM-FM, Milwaukee, Wisconsin, Report No. 11420, April 3, 1973.

[7] With respect to free speech, the First Amendment—which relates to abridgement of speech and the press—was not intended as a defense *against* media diversity. In broadcasting law, the First Amendment rights enure primarily to the listening public and the Constitutional standards have been applied to coincide with this country's scheme of privileged trusteeship for the electronic media. See *Red Lion Broadcasting Co.* v. *FCC*, 359 U.S. 367 (1968).

As to the free market arguments, I contend inapposition. Absolute free market theorems suggest a condition of free market entry which clearly lets out broadcast licenses. And, there can be no unrestricted financial exploitation of a communal resource where the property rights repose in the public. A licensee is not a landlord with an unlimited right to alter the premises for commercial advantage, a licensee is merely a spectral tenant with caretaking responsibilities.

The issue is whether the rights of minority audiences are subordinate to the entrepreneurial quest for profit maximization.[8] We are not naive enough to suppose that formats are changed for any altruistic purpose.

While I enthusiastically endorse the right of a conscientious broadcaster to reap all due economic rewards, the primary function of a license is service to the public—not service to the licensee. Once a licensee has used the spectrum to promote a particular format and snared a loyal following, the desertion of that format for the sheer sake of enlarged profits and without regard to the public interest, deserves some scrutiny.

Chillingly boundless are the number of hypothetical extremes to which the court's doctrine could be taken if extrapolated to logical absurdities. Further, as Justice Holmes remarked: "The life of the law is not logic, it is experience." In the real world, some of the possibilities portended become unlikely. I, too, would throw up my hands in helplessness if I believed the courts expected an intricate policy of format allocation on a grand scale and a system of intimate monitoring.

However, I believe a common sense interpretation of the judicial edicts is preferable. To determine whether a format is unique in the community, I would

---

[8] Profit maximization is not necessarily coextensive with audience maximization as Commissioner Robinson suggests in his discussion of demographics. The game is the capture of mass affluence, not merely the mass. The demise of Lawrence Welk from network TV was based on its appeal to a relatively impecunious senior citizenry.

use only a threshold test of conspicuous generic equivalance: I would not seek identicality through minute analyses. To determine whether there is "significant grumbling" about a proposed format change, I would compare the magnitude of the protest to the magnitude of the service area using a zone of reasonableness concept. I would interpret economic feasibility as consistent with a profit comparable to the average station in the market (or like market) since I don't believe the court expects anybody to labor for less than fair recompense.

Using the above guidelines, and under the circumstances likely to occur, the trade-off between government obtrusion and economically-inspired exclusion becomes reasonable. Our energies would be best spent, I believe, in devising tenable standards to apply rather than battling speculative aberrations.

CONCURRING STATEMENT OF
COMMISSIONER GLEN O. ROBINSON

Among the many public controversies in which we have been ensnared lately, the matter of radio program format changes is not prominent. Indeed, I venture to say that most of the broadcast industry itself perceives, dimly if at all, that there is any problem here that merits more than passing attention. This evident lack of concern even by the industry is perhaps understandable in light of the general public preoccupation with television, but it is myopic. The issues which we seek to resolve in this inquiry have far-reaching ramifications not merely for radio

but for the entire broadcast industry. In particular, the First Amendment questions are as subtly difficult as have been encountered anywhere—a fact that neither the industry nor, I daresay, the Court of Appeals, has fully appreciated. While I agree with what the Commission says in the accompanying Notice, I think some additional comments on this vexing problem are appropriate.

I. *Background*

A short background sketch of the problem is useful to explain how we got into this predictment.[1] More or less it started with *Citizens Committee to Preserve the Voice of Arts in Atlanta* v. *FCC*, 436 F.2d 263 (D.C. Cir. 1970). The Commission there granted an assignment application where the assignee proposed to abandon a classical music format in favor of another format, one which is expected to make more money, a "blend of popular favorites, Broadway hits, musical standards and light classics." An *ad hoc* Atlanta citizens' group filed a petition for review and the Court of Appeals reversed. Section 310(b) of the Communications Act, said the Court, requires the Commission affirmatively to find, before approving it, that a proposed assignment will serve the public interest; section 309(e) requires that disputed substantial and material questions of fact must be resolved

[1] For a useful review of the problem in the general context of regulating program diversity, see Note, *Judicial Review of FCC Program Diversity Regulation*, 75 Colum. L. Rev. 401 (1975).

at a formal hearing; and that, in view of Congress' undoubted intention that "all major aspects of contemporary culture . . . be accommodated by the commonly-owned public resources whenever that is technically and economically feasible," 436 F.2d at 269, the proposed abandonment of a format "unique" in a market could not be approved without the Commission considering the public interest implications of abandonment at a hearing.

Lakewood Broadcasting Service, Inc. v. *FCC*, 478 F.2d 919 (D.C. Cir. 1973) and *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973), decided by different divisions of the Court of Appeals on the same day, modified *Voice of Arts* in one respect, and introduced some new wrinkles of their own. *Lakewood* concerned the proposed abandonment of an all-news format in favor of country and western music in metropolitan Denver, *Progressive Rock* concerned a proposed switch from rock music to a middle-of-the-road format in the Toledo, Ohio, market. The former case, the Court found, the Commission had decided rightly: a close reading of the record indicated that there was no dispute over questions of fact but only over the legal conclusions to be drawn therefrom. In *Progressive Rock*, however, the Court brushed aside the submission that Toledo's other aural services furnished at least some progressive rock music to that genre's enthusiasts: "We deal with format, not the occasional duplication of selections." 478 F.2d at 932.

In one respect, at least, *Progressive Rock* trimmed the breadth of *Voice of Arts*: rather than apparently requiring a hearing whenever a proposed format change would apparently lessen diversity in a particular market, a hearing would be required only "when public grumbling reaches significant proportions." 478 F.2d at 934. But at the same time, the Court made it clear that with respect to the law of format changes, it had no sympathy for the Commission's desire "for as limiting an interpretation as possible." 478 F.2d at 930. And it went on to suggest that the decisive question respecting whether an assertedly "unique" format might be abandoned was not whether it had been profitable in the past or was currently profitable, but rather whether it was "economically feasible." 478 F.2d at 932.

Citizens Committee to Save WEFM v. *FCC*, 506 F.2d 46 (D.C. Cir. 1974) capped this series of cases, and in two respects completed it. First, as the decision of an *en banc* court, *WEFM* is, of course, "the law of the circuit," and binding on all subsequent divisions of the Court until modified either by the Court *en banc* or by the Supreme Court.[2] Second, *WEFM* spelled out more explicitly the reason for the rule. Rather than merely asserting, as the prior cases had, more or less cryptically, that there is a

[2] Judges Robb and McKinnon dissented. Judge Bazelon specially concurred in a thoughtful opinion which suggests a basically different approach to the problem than that of the Court's opinion. While I vastly prefer Judge Bazelon's approach to that of the Court, I think it is not without difficulties, some of which I shall note below.

public interest in format diversity, the Court made clear the unacceptability of the Commission's aversion to deciding which among several proposed entertainment formats would best serve the public interest. The Court concluded that the Commission's reliance on market forces to allocate formats properly was unreasonable. Such comparisons of protected speech —weighing one protected speech against another to determine which is more in the public interest—is something the Commission has tried to avoid. In *WEFM*, the Commission was told, this policy is illegal.

> "[T]here is no longer any room for doubt that, if the FCC is to pursue the public interest, it may not be able at the same time to pursue a policy of free competition. . . . There is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time. More time may be sold, and at higher rates, by a station that has a larger *or* a demographically more desirable audience for advertisers. Broadcasters therefore find it in their interest to appeal . . . to the particular audience that will enable them to maximize advertising revenues. If advertisers on the whole prefer to reach an audience of a certain type . . . then broadcasters, left entirely to themeslves by the FCC, would shape their programming to the tastes of that segment of the public. This is inherently inconsistent with 'securing the maximum benefits of radio to all the people of the United States' and not a situation that we can

> square with the statute as construed by the Supreme Court."

506 F.2d at 267, 268 (citations omitted; emphasis in original). The Court called into question whether *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940), is still good law and indicated that while it was prepared in the ordinary case to defer to the Commission's judgment concerning what policies would maximize the benefits of radio broadcasting to the public, it was not prepared to accept proposed format abandonments as ordinary cases.

II. *The Marketplace and Program Choices*

WEFM's challenge to the prevelant assumption about the effectiveness of the marketplace in satisfying the public's programming tastes and interests raises an issue of fundamental importance to the entire regulatory scheme. This is not an occasion for debating with the Court as to the economics of broadcasting. However, with all due respect, I think two points should be made in response to the Court's dicta on this issue.

The fact that in an advertiser-supported system the audience does not choose programming by *direct* market "votes" is simply not a decisive objection. The relevant and important question is whether programming reasonably corresponds to audience preference. I believe it does. Advertisers can scarcely be indifferent to listener choices. Rational advertisers will not buy time on stations that do not attract an audience, and a station does not attract an audience

unless it provides listeners with programming they want to hear. The incentives of rival stations to offer competitive programming alternatives in order to attract audience, in order to increase their attractiveness to advertisers, are not essentially different from those that would apply if stations sought support directly from listeners.

I agree with the common criticism that the present system is biased in favor of majoritarian interests and that those of the minority sometimes suffer in consequence. I assume this is the thrust of the Court's point about advertisers seeking to reach only those persons with desirable demographic characteristics ("demographics," in the slang of the trade). Demographics are not irrelevant to advertisers, but their influence should not be exaggerated. In any event, the economic logic that drives this tendency toward mass audience appeal is basically a function of the number of competitive outlets and the size of the market. See my dissenting opinion in *Prime Time Access Rule*, 50 FCC 2d 829, 889, 894 (1975); Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting*, 66 Quar. J. Econ. 194 (1952). By the same token, an entirely different system of marketing—such as a pay system—might well yield programming more responsive to minority tastes, as it would give people a better opportunity to express the intensity of their preferences and would avoid any advertiser bias. See my opinion in *Subscription TV Program Rules*, 52

FCC 2d 1, 72, 73 fn. 5 (1975); Minasian, *Television Pricing and the Theory of Public Goods*, 7 J. Law & Econ. 71 (1964). On the other hand, it is not at all clear that in the radio format change situations that are of concern to the Court, such a "pure market" system would yield results materially differing from those the present system produces. Would classical music afficionados pay more to hear broadcasts of their favorite programming than other, competing, listeners? (In considering this one would, of course, have to consider the widespread availability of tapes and disks.)[3]

We can, it seems to me, reasonably, even intelligently, guess that the existing system of program distribution is a satisfactory way to do the job, even though all segments of the "listening public" (as distinguished from the "purchasing public") may not be represented. Whatever may be the imperfections of the market in responding to viewer choice, the important, relevant question for us is whether administrative fiat is better. It has always been a centerpiece of broadcast policy that broadcasting is essentially a private enterprise albeit one that is

[3] The Court ignores the availability of other, competitive sources of consumer satisfaction as these might bear on the public interest-diversity question. It is a serious mistake, however, to think about the uses of radio and television without also considering the context in which the electronic media are used. A part of the context relates to the uses of other media of information and entertainment. I would make more of this shortcoming if the Commission did not itself display it so frequently.

heavily regulated. As the Supreme Court stressed in *FCC* v. *Sanders Bros.*, 309 U.S. 470, 475 (1940), the Communications Act does not confer on the FCC "supervisory control of the programs, or business management or of policy." Though the Court in *WEFM* suggests that *Sanders Bros.* is an anachronism, I must respectfully but insistently reply that it is not, either as a matter of wise policy or as a matter of law. As to the latter, *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) seems to me dispositive.[4] Whether *Sanders Bros.* still makes sense as normative social policy can be divided into two questions: first, as a practical matter, can the FCC effectively do what the Court seems to envision; second, what are the likely consequences—in particular what are the constitutional implications—of seeking to do so?

[4] The Court's reliance in *WEFM* on *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) and *Hawaiian Tele. Co.* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974) for the contrary proposition seems to me most dubious; both cases dealt with public utilities for which the statutory scheme is fundamentally different in regard to the role of competition. It should, however, be noted that even in the field of public utility regulation increasing recognition has been given to the importance of competitive marketplace process. See *Washington Util. & Transp. Comm'n.* v. *FCC*, 513 F.2d 1142 (9th Cir., *cert. denied sub nom., National Ass'n of Reg. Util. Comm'rs* v. *United States*, 423 U.S. 836 (1975). See generally, Posner, *Natural Monopoly and Its Regulation*, 21 Stan. L. Rev. 548 (1969).

III. *Formats, Uniqueness and Diversity*

At the ouset it is important to appreciate how difficult it has been even to define the problem. That there is a general public interest in diversity I accept without much difficulty. This is part of the time-honored catechism which FCC Commissioners are expected to recite immediately after taking the oath of office. The difficulty comes, as usual, with trying to apply this commandment to concrete cases.

Of the numerous questions posed by the Court's mandate to preserve unique formats, the first and most basic is, what is a "format"—or more precisely, what is a particular station's format? Before one can know whether a unique format is being abandoned, it is necessary to know what the format is, and what makes it unique. The *WEFM* decision makes it clear that licensee labels are not controlling; the Commission is expected to make this determination for itself. For example, the *WEFM* opinion indicated that distinctions might have to be drawn within labeled formats—such as between 20th century "classical" music and classical music composed earlier. How is one to be certain, however, that the relevant format category is "classical"? And until we can answer that question, how shall we know when a change has occurred? Shall a station that bills itself as, say, a "fine arts"[5] station be deemed to have

[5] The Court in *WEFM* seemed in doubt whether "classical" and "fine arts" denoted the same format. 506 F.2d at 264. For present, illustrative, purposes, I equate them. In doing so, I remember Humpty-Dumpty's edict that words mean what we want them to mean.

altered its predominantly classical music format by playing Victor Herbert? One possible answer may be that Beverly Sills' rendition of a Victor Herbert tune is "fine arts" while Jeanette MacDonald, singing the same selection, is "easy listening" or "golden oldies." To be sure, no one expects the FCC to be concerned with occasional lapses of identity. As every dog gets at least one bite, so every station gets an occasional pass for deviations from the expected norm. But what is the expected norm? How many "bites" of John Philip Sousa do we permit a classical music station to take? [6]

The Court of Appeals' reply to such questions, in its seminal decision in *Voice of Arts*, is devastating in its open abandonment of workable guidelines: "While an exact verbal definition may be somewhat elusive, this is perhaps a subject matter of which it can also be said that we at least 'know it when [we hear] it.' See *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 . . . (Stewart, J. concurring)." 346 F.2d at 265, n. 1. With the greatest respect for Justice Stewart, I must protest that it is undesirable to annex yet more territory to the swamp of obscenity by transplanting his test for it into the present arena.[7]

---

[6] What about syncopated Bach (the official title of the theme music is "Play Bach Jazz") which Washington lovers of classical music will recognize to be the theme music of the Renee Channey show on "fine arts" station WGMS?

[7] One often overlooked fact concerning Justice Stewart's eye for obscenity in *Jacobellis* bears notice in this connection: he did not see it there, and he has not often seen it in subsequent cases either.

Nor is much light shed on the problem by the "public grumbling" standard, suggested in *Progressive Rock* and reiterated in *WEFM*. Insofar as this standard is seen to go not only to the "substantiality" that is requisite to place an issue in hearing, 47 U.S.C. Section 309(e), but beyond, to characterize the nature of the interest that the public has in diversity, it raises more problems that it solves. Clearly such problems go beyond radio: when CBS cancelled *Beacon Hill* and "public grumbling" was heard, was the FCC expected to rush forth to measure the decibels to determine if the grumbling was "of significant proportions"? And if the Commission found it to be such, then what?

All of these indications point in the direction of ensnaring us in what Alexander Bickel once described as the "web of subjectivity," but which, in this particular case, might more accurately and evocatively be called a Sargasso of idiosyncracy. The standard for "uniqueness" or "diversity"—the diversity that the public wants enough so as to cause it to grumble when it is diminished—is obviously idiosyncratic and subjective. Quite aside from the constitutional objections (which I will address below) this subjective element presents intractable difficulties in administration. What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format "unique" (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identi-

cal, people—radio listeners—can and do make distinctions. For example, in most large markets there are a number of middle-of-the-road formats which seem identical on any objective or quantifiable basis; yet they are far from interchangeable to their respective audiences. Indeed, if people did not distinguish among these stations, there would be no reason for them to co-exist—and little economic likelihood that they would. Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's "sound" and that citizens' groups (and, alas, appellate judges) call format.[8] It follows, therefore, that by the subjective standards that the Court seems to embrace, any format is unique; from which it follows, all must be preserved.[9] At that thought the mind swims and the heart sinks.

Lest the foregoing rendition of legal conundrums be thought of as so much lawyers' fustian, I offer some real-world illustrations. Radio Station WGBH-FM, Boston, Massachusetts, whose application for renewal of its license is now under a petition to deny,

[8] See, for example, the Appendix to this separate statement for a sustained illustration of the point.

[9] It remains to be explored whether this procedural problem might not be handled by placing on a format change protestant the burden of showing that the proposed new format would not be unique as the format proposed to be discontinued. As a rule, it seems to me unfortunate to adjudicate substantive matters by the manipulation of procedural rules, but occasionally there is no other choice.

has, for the past 25 years, featured what may be described as a sort of highbrow "magazine" format. The major component of this format, to judge from the station's submissions,[10] has been classical music, but with a substantial amount of jazz, non-Western music, poetry and drama, together with news, public affairs, literary readings and miscellaneous other selections. (Opposition to Petition to Deny, p. 2) Recently, the WGBH Educational Foundation (which is also the licensee of two educational TV stations) has allegedly been experiencing some financial difficulties, and, in response to this situation (and presumably others), the foundation apparently re-evaluated what the radio station ought to be doing. An internal memorandum to the station's staff prepared by WGBH Vice President Michael Rice in late November of 1974, has been submitted to the Commission by petitioners to deny, and sets out in some detail the views of management concerning the station's future.[11] A part of this evaluation required Mr. Rice critically to scrutinize the station's past performance and to discuss what its future ought to be like in light of changing listener attitudes toward radio. Mr. Rice observes:

[10] These submissions are not all uncontroverted, and may well have to be sifted in a hearing. For the present purpose of illustrating the general problem, however, I shall accept these representations as true.

[11] For the present purpose, I assume without deciding that this memorandum is authentic: the licensee has not, in its pleadings, made objection on this point.

". . . [I]n the days before television . . . radio schedules, like television's today, were fragmented into highly-varied, regularly scheduled daily and weekly shows . . . [;] people would search out the particular shows they wanted at particular times on particular stations. . . . [Today, the overwhelming number of persons] listen not to favorite particular programs, but to their favorite stations. These listeners favor a station when they know it can be counted on to offer a specific service they especially value *whenever* they tune it in. . . . It's my guess that the *consistency* in the specific kind of service a station offers is far more important to listener tune-in decisions than even the *quality* of the way that service is produced and presented. That sums up the present problem for us; much of what we do is of matchless quality, but altogether, it's bewilderingly inconsistent."

The memorandum goes on to argue that the mixed format is no longer a tenable way to run the station, and that, in order to flourish, WGBH-FM must have a more focused, narrowly-defined mission.

> "Now, then, what should that mission be? If we deal from our strength, and we'd be foolish not to, the answer must involve music. From the day of that first Boston Symphony Orchestra broadcast over 23 years ago—through all of the different radio managers and program ventures that have come and gone—until today, nothing has so prominently, so distinctively identified WGBH Radio as our concert broadcasts and other musical programs. And for good reasons. From the beginning, we've been almost a part of music

> performing and academic institutions of international rank. . . . I have no interest at all in the kind of service that might be described as classical juke-box. That might be lucrative in listener contributions. It would certainly be cheap to provide. But it would be cheap quality, too. Others might properly do it, but not WGBH. . . . Rather, the musice programming that we provide must be infused by relative intelligence, an informed commitment to the *cause* of music in the life of human society. . . ."

On its face a seemingly praiseworthy goal. But, now, for the other side.

> "On January 1, 1975, substantial and significant changes were made in the program service format of WGBH-FM, a non-commercial public radio station. . . . These changes were made unilaterally on the station's part without consultation or notification of the public whose donations and tax dollars support it. . . . In cancelling 90 percent of their jazz programming WGBH has effectively wiped out the most significant contribution the black man in America has made to the world of music."

Petition to Deny, filed by Committee for Community Access on March 3, 1975.

Few facts regarding the program appear to be controverted—there has, clearly, been a "format change," and this change has, clearly, de-emphasized (among other things) jazz music at the expense of classical music. There have evidently been public grumblings of significant proportions concerning

whether this change is in the public interest. How, assuming it wishes to perform its task exactly as required by law, should the Commission respond to this collision of values? If the Court means what *WEFM* says, there will apparently have to be a hearing. The controverted and unresolved "fact" concerns whether the former WGBH format was unique and whether the format change has diminished diversity or is otherwise inconsistent with the public interest. The fact that this is a renewal rather than an assignment is, of course, legally irrelevant. The Commission may not grant *any* application, whether for renewal or assignment, without first making a public interest finding—the very same finding in either case. Yet a hearing on an issue so ill-defined, as the Court must surely appreciate, could easily go on for weeks or months, costing in lawyers' fees a significant fraction of the station's entire annual budget.

One more illustration should suffice to make the point. In 1973, Kaiser Broadcasting Corp., licensee of WCAS, a small AM broadcast station in Cambridge, Massachusetts, attempted to assign the station to Family Stations, Inc., which proposed to change the WCAS format to highlight religious music and concerns. The WCAS format had been changed and adjusted several times during the 1960's; finally, the station settled on a format described as "folk-folk/rock," with which it stayed through several years. The assignment application was eventually granted, but, on petition for reconsideration, the

Commission was flooded with letters and petitions—public grumblings of significant proportions. Family attempted to establish that "folk-folk/rock" was not a unique format in the Boston market—that indeed two other stations regularly featured such music. In its *Amendment to Application for Assignment of License*, December 12, 1973, Family said:

> "While the precise mixture [of music] may not be duplicated in toto on some other individual basis, every musical component can be found on one or more other stations in the Boston areas."

Replied the Committee for Community Access:

> "It is quite simply an error in logical thinking to state that because the music presented on Format A is also part of Format B; then Format A equals or is available as Format B. This is a complete misstatement of musicological facts. One example that disproves the assertion is the simple fact that there is never loud, fast rock in the WCAS format while there is in those of WBCN and WNTN. This fact alone gives WCAS a unique sound which can never be offensive or jangling while any single hour on WNTN or WBCN can contain one or more decibel piercing, upbeat, rock or jazz selection."

Petition for Reconsideration, page 4. Or, as the Court of Appeals put it in *Progressive Rock*, "We deal here with format, not the occasional duplication of selections." 478 F.2d at 932.

This assignment application was dismissed just as our Broadcast Bureau was drafting a hearing order.

But, although the case died, the principle being contested lives on: radio listeners identify in radio formats idiosyncracies which are too fleeting to be caught in the clumsy nets of legal formulations. This difficulty clearly aggravates the already grave First Amendment problem. Even assuming some regulation of radio formats can pass constitutional scrutiny, to make concrete legal obligations turn on criteria (what is an "offensive sound?" what is a "jangling" sound? what is an "upbeat" sound?) which are so vague and so elusive that licensees cannot know what the law requires of them, seems to me a clear violation of due process, see, e.g., *Lauzetta* v. *New Jersey*, 306 U.S. 306 (1939) as well as unconstitutional infringement of free speech, see, *e.g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Cox* v. *Louisiana*, 379 U.S. 536 (1965). See generally, Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

It is possible to continue almost indefinitely descrying ineffabilities. The existence of this legal swamp gas is only evidence of a marshiness in the underlying intellectual terrain: there is, I believe, no way for the Commission to allocate program formats in such a way as to maximize the welfare of radio listeners according to their own preferences. A simple illustrative model will make the point.

As noted in the Commission's opinion, there are upwards of 80 entertainment formats used by American radio stations, including Basque, Eskimo, Farm, Tagalog, Weather and Yugoslavian. Excluding those

with a small number of listed stations, there appear to be about a dozen principal formats. Trying to decide which stations ought to carry which formats in order to maximize the welfare of the community of radio listeners in a typical large market is a project too difficult to undertake for heuristic purposes.[12] Instead, to get a flavor for the character of the project, let us imagine a very small market, with only two available frequencies and three groups who are competing to get their preferred formats on the air. The three formats we are going to decide among are middle-of-the-road (MOR), country & western (C&W), and classical. One of the three group competitors has the following preference schedule among the above-mentioned formats:

1. middle-of-the-road
2. country & western
3. classical

The second group has a different preference schedule:

1. country & western
2. classical
3. middle-of-the-road

---

[12] It is not, of course, safe to assume that "diversity," "the public interest," and "community welfare" necessarily correspond to the same underlying value. The Court of Appeals takes the position that "diversity" and "the public interest" equate as a matter of law. It is easy, however, to imagine a situation where mandating "diversity" seriously undermines "community welfare" by requiring the carriage of formats for which there was no great public demand, with the attendant implicit opportunity costs associated with this action.

The third group feels like this:

1. classical
2. middle-of-the-road
3. country & western.

Let us assume that the members of each group are equally numerous, and that the preferences of each member of each group are entitled to exactly as much deference as the preferences of each other member of his own group and each member of each other group.[13] Now, let us see if we can allocate formats "rationally." Suppose we decide that we will have classical and middle-of-the-road. That will be "fair," in one sense: each of these choices is the first choice of at least one of the three contending groups. But what about the country & western fans? Two-thirds of the audience prefers C&W to classical: to be fair, then, we ought to promote country & western over classical. So our two choices are MOR and C&W. But that is not fair either. Two-thirds of the audience prefers classical to middle-of-the-road: it is

[13] For purposes of this exercise, another constraint should be mentioned—that the scarcity is genuine—that, in fact, there will be no "hybrid" formats and, accordingly, that some group will necessarily be disappointed. For the reasons advanced by Michael Rice, *supra*, there are very few hybrid radio program formats in radio today (using "formats" here in the broad sense of a consciously stylized type of programming). The Commission could, of course, mandate hybrid formats, and, in part, this may be the practical content of the format-diversity dispute. Whether this would increase community welfare, of course, is another question entirely. See fn. 12 *supra*.

only just, therefore, to replace MOR with classical, so that our two choices are classical and C&W.

But that is also wrong. Two-thirds of the audience prefers MOR to classical, so we ought to go back to where we started—with C&W and MOR.

Within the constraints of the model, I see no way to make allocations so as to maximize viewer satisfaction, and in the real world, which is much more complex than the model, "rational" allocation seems even more difficult. Cf., K. Arrow, *Social Choice and Individual Values* (1951).

But if our assumptions about the relationship between formats, licensees and the public interest have been beside the mark for all these years, as the *Voice of Arts* line of cases says, then it seems to me unthinkable that we should allow the consequences of that holding to fall asymmetrically on licensees who are seeking assignment authorization. Indeed, elementary considerations of fair play as well as constitutional principles of equal protection would seem to forbid the Commission from placing on any one licensee the full weight of the obligation to promote diversity without imposing an equivalent burden of obligation to the public interest in diversity on its competitors. Seen in this light, the Court's concern in *WEFM* about the financial status of the licensee proposing the change is irrelevant: the relevant question is not whether the station can sustain itself on its "unique" format but whether there is any basis for requiring *it* to do so rather than spreading the

presumed [14] financial burden on all licensees. The answer to this question must be negative. In short, if the FCC's responsibilities to the public interest include the obligation to implement what the Court of Appeals has described as the "undoubted intention" of Congress that all major cultural groups be represented to the extent possible, I can see no escape from market-by-market allocation proceedings [15]

[14] I presume the diversity obligation is a burden because it seems improbable that licensees would seek to trade "unique" formats for others that are less profitable. To the extent of that difference in profitability, the unique format is a "burden."

[15] There are a number of ways the Commission could apportion the diversity obligations of licensees in a particular market, but all of them would have at least one administrative chore connected with them—the necessity of the Commission ascertaining what the public interest required by way of format diversity in each market or at least the 100 or so largest markets. Undoubtedly, we would find that the demand for, say, eastern European language broadcasting was greater in Pittsburgh and Cleveland than in Phoenix and Atlanta, and that all-news programming was much more in demand in Washington, D.C. than in Walla Walla, Washington: but how we should apportion the obligation to carry a certain amount of twentieth century classical music, other classical music, progresive rock music, country & western music, non-western music, non-music, and all the other possible formats is a matter that would have to be studied in great detail at a later date.

One way the diversity obligation could be pursued, of course, would be to make all station formats essentially hybrids. A 24-hour class-B station, for example, could be required to carry 50 percent classical music and 50 percent soul music. Norms would obviously have to be evolved, however, to prevent the station management from relegating one or the other format to undesirable hours; probably, the most

which would determine what array of formats a particular community required, together with which station would be allowed to use which format. With all its evils, this system clearly would be fairer than the one we have now (under the *Voice of Arts-Progressive Rock-WEFM* mandate) which, like Browning's Caliban on Setebos, lets "twenty pass and stone[s] the twenty-first Loving not, hating not, just choosing so." That it would require us to take stock in what Judge Leventhal has characterized as "the evils of communications controlled by a nerve center of government," *National Broadcasting Co., Inc.* v. *FCC*, 516 F.2d 1101, 1133 (D.C. Cir. 1974), is simply one of the costs that would have to be endured.

IV. *Constitutional Dimensions of Format Regulation*

I assume without discussion that the First Amendment protects entertainment programs, see, *e.g.*, *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *WEFM*, 506 F.2d 246, 261, 271, n.9 (Bazelon, CJ., concurring), even those which apparently lack redeeming literary, artistic (musical) or social value. Freedom of speech in broadcasting differs considerably, of course, from freedom of speech

equitable system would require that different formats alternate hours or days throughout the license term. No matter what approach were adopted, however, there is no escaping the magnitude of the administrative burden, nor the great amount of government stultification of private speech that would evolve from a faithful pursuit of the Court of Appeals' current mandate.

conventionally considered. Compare *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 262 (1974) with *Red Lion Broadcasting Co.* v. *FCC*, 695 U.S. 367 (1969).[16] Accordingly, the blackletter rule that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972), may not apply with full force to broadcasting but rather may be counterbalanced to a degree by the notion that nothing in the First Amendment prevents a licensee from being required "to share his frequency with others and to conduct himself as a proxy or fiduciary" for his community. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 389. At the same time, however, no court has gone so far as to authorize the Commission to forbid a broadcaster to carry a particular program (see 395 U.S. at 396) or to dictate to licensees "what they may broadcast or what they may not broadcast." *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470, 480 (2d Cir. 1971). Whatever it is that makes broadcast communications "special," however, cannot make irrelevant the concern that government not become too deeply involved in the content choice of essentially private communications concerns. The First Amendment cannot merely mean that government should

[16] For extensive elaboration of this point, Chief Judge Bazelon's concurring opinion in *WEFM* offers an impressive place to begin. In earlier days, I explored the whole subject in *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67 (1967).

refrain from "bad" interventions in speech: if it is to have any vitality at all, the constitution must constrain—it must especially constrain—well-intended inverventions also. As Mr. Justice Brandeis memorably put it: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are benificent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928).[17] But if we go forward with the *Voice of Arts* version of the public interest, we shall obviously have to interrupt that tradition, for the obligation to carry one format necessarily entails the obligation to refrain from presenting another. It may be, at the center, that a middle-of-the-road format can safely play any sort of music, so long as it does not specialize: but for a progressive rock format to dally with Mozart or a classical format with the Beatles would clearly have to be a sort of civil *malum prohibitum*, for which our rules and regulations would have to prescribe a remedy. If the Commission is to pursue this route, of course, it will have "to oversee far more of the

[17] Equally apt is the warning of Laocoon at the stage of Troy when the Greeks offered their celebrated horse as a peace offering: "I fear the Greeks even when bearing gifts." Laocoon was, of course, strangled by serpents for his efforts. I shall apparently meet a more comfortable fate, because, even if I should be discomfited in this effort to dislodge what I believe an unjust and unwise rule of law, at least I shall be able to soothe myself in defeat with the classical music of my favorite composers.

day-to-day operations of broadcasters' conduct" than even would have been the case with mandatory access editorial advertising, a reason of apparently constitutional stature in the Supreme Court's holding in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 126 (1973).

The constitutional issue here is clear enough, and need not be labored. The point which requires emphasis is that we are not here concerned with the conventional slippery slope, the line-drawing problem of the sort that clutters the legal landscape and fills the days of lawyers on both sides of the bench. For, if we are to avoid the unthinkable choices of, (1) ignoring the Court's mandate entirely or, (2) allowing the full weight of its doctrine capriciously and differentially to fall on an occasional applicant, we shall have to pitch ourselves headfirst off of the slippery slope into the hitherto untrespassed-upon valley of comprehensive control.[18] In candor it should be

[18] An intermediate possibility, of making such judgments only when faced with a comparative choice between two applicants, is suggested in Chief Judge Bazelon's concurring opinion in *WEFM*. This route would, in my view, be preferable to that of the Court. But not even Judge Bazelon's approach resolves the tenacious practical difficulties that belong to making objective administrative judgments in this area. Hence, this approach does not eliminate, although it does ameliorate, the First Amendment objections. It is not enough, I think, simply to note the necessity of choice under conditions of scarcity. "Scarcity" is a relative (and subjective) term, subordinate in the overall table of constitutional values to many other interests. "Scarcity" may thrust upon us certain necessitous matters we would rather avoid; but

acknowledged that the Commission does not plead the First Amendment with hands that are altogether clean. In view of its efforts in other areas to regulate broadcast programming, directly or indirectly, some critics will no doubt view its defense of free speech here as coming with poor grace. Poor grace or not, it comes with good sense and good sense is not to be despised for lack of precedent. Perhaps the Commission would have greater credibility had it always stood firm for righteous principle, but I hope we have not forfeited our standing to assert a position consistent with our most fundamental and valuable principles. Considering the deferential respect paid even to the most fanatical and unpopular views of private persons pleading the First Amendment in their own self-interest, see, *e.g.*, *Redrup* v. *New York*, 386 U.S. 767 (1967), it would be an anomaly—would indeed be a crushing defeat for liberty—if the government itself could not plead the constitution without embarrassment and apology.

it is hardly permission to run rough-shod over free speech interests. Harry Kalven expressed the point exactly:

> "The traditions of the First Amendment do not evaporate because there is licensing. We have been beginning, so-to-speak, in the wrong corner. The question is not what does the need for licensing permit the Commission to do in the public interest. Rather, it is what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license."

Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. of L. & Econ. 15, 37 (1967).

APPENDIX

Memorandum of Terry P. Hourigan, Program Manager, to the staff of WMAL-FM, Washington, D.C., reproduced from R. Hilliard, *Radio Broadcasting* 119-122 (1974).

Basic Objective

WMAL-FM has as its basic programming objective the achievement of the largest 18 to 34 year-old audience in the Metropolitan Washington area. This will, in turn, allow us to accomplish two essential goals: making our station a dominant force on the FM band and increasing our contribution as a profit center in the Evening Star Broadcasting Company.

We approach this task with a very positive outlook. The timing is right, the goal is realistic and our approach is sound. Our plan of attack centers around the market key to this 18 to 34 year old audience, the 25 year old, highly educated young professional. He or she is our specific target. If we can attract the 25 year old we have zeroed in on the person of highest influence in our demographic group. Persons on the younger end of the spectrum all wish to be thought of as being "really adult," while many of those over that age are clinging to the "with it" image of the younger man or woman.

These people all coalesce in their radio listening desires. Brought up on a steady diet of top-40 and hard rock music, they have grown accustomed to its rapid pace and brevity of expression, but have been educated past the point of being able to accept the

banality of top-40 or the non-musical noise of hard rock radio. There exists, therefore, a potentially huge market of untapped listeners waiting to be claimed—waiting for a station or sound they can call their own. The station is WMAL-FM. The sound is "*The Soft Explosion.*" What follows is our game plan.

The Market

Washington, D.C. is a community dominated by relatively affluent young professionals. The metropolitan area is experiencing an explosive growth in population. Rapidly expanding Federal Government facilities continue to attract highly educated younger families to move into expensive homes in the metro area where an extremely high percentage of the more affluent families are located. The following facts make Washington unique among the nation's 10 largest cities. Washington metro area has an average median age of 24.1 years, with 34.7% of the population under 18 years of age and only 6.0% over age 64—youngest by far in the country.

The average household income is $12,477 annually, the *largest* in the United States:

Washington ranks #1 in household income.
Washington ranks #1 in population increase.
Washington ranks #3 in value of homes.
Washington ranks #2 in annual purchase of FM sets.
Washington has 431,300 metro area men 18-34.
Washington has 468,800 metro area women 18-34
Washington is the nation's youngest, fastest growing market.

Personalities

Our on-the-air personalities are now, and will continue to be, aware of the unique opportunity they have to help mold the thinking and tastes of the 18 to 34 year old audience, and of the corresponding burden of responsibility this entails. They have uppermost in their minds the thought of projecting a positive, warm image—the thought that the station cares very much that the listener has chosen to listen to us. We feel, as broadcaster Chuck Blore said, "If you're programming a radio station and someone tunes into your frequency, they've given you everything they have to offer, their ears and their minds. And if you're *programming* that radio station, you have to give them something in return, and we try to give them reward after reward after reward for tuning to our place on the dial."

We believe our personalities can do just that. Their job is to communicate with the audience, to project the image that they are happy in their work, that it is truly pleasurable to present our programming, that the listener deserves the very best we have to offer and that the very best is exactly what he or she is getting.

Music

A most essential ingredient in programming for the 18-24 listener is music. While very careful control must be exercised over the selection and presentation of music, it must not sound too structured. Our morning show has been used for the past four months as a

testing place, a proving ground for our new music mix. It has proven successful beyond our fondest hopes. Our audience growth in this period of tightened programming control has been 60% over the last two rating books, and our demographics almost entirely 18-34. The music formula has been devised for simplicity of implementation. This simplicity adds to our control, making more effective our ability to hold control of our music in the face of changing audience tastes. In effect, it makes us "fad-proof."

We play a mix composed of three ingredients:

1. *Contemporary Hits.* Those of the current contemporary best-sellers which fall within the parameters of the taste of our 25 year old; no "bubble gum," no non-musical noise, only good solid hits, songs which have achieved mass favor with young-adult listeners.

2. *New Album Cuts.* These songs are selected by our music director as the best efforts of the best contemporary artists, only the best one or two tracks in the best of the new albuns. (This keeps us ahead of the "hit" game. In recent years the former music industry trend has been reversed and today albums are released months ahead of the singles.)

3. *FM Oldies.* These are simply hits by groups which have become the "standards" of modern rock music. Included are people like The Beatles, The Byrds, Blood, Sweat & Tears, Carole King, etc. These are chosen carefully and mixed for best maximum effect.

These three ingredients, carefully selected, imaginatively showcased, are the entirety of our music

formula. Nothing gets on the air which has not met these established criteria.

News and Public Affairs

1973 will be a year of departure from the previously accepted standard of formal, "structured" newscasts. Our air personalities will integrate news items, with particular emphasis given to the local news, throughout the entire hour. There will be no "aside" comments by the announcers, no personal opinions about the news stories, just a good, brief, positive delivery of information, as smoothly integrated into the overall program flow as a commercial.

WMAL-FM will continue its effort to broadcast programs in the public interest, but they must take a new form. The line uppermost in our minds must be *"Eliminate Turnoffs!"* We feel a line of demarcation must be drawn between informing and educating the listener, and boring him or her. "Mini-specials" will be the order of the day, with all our personalities brought into the effort. These mini-specials will always be attempting to accomplish something positive —getting our audience personally involved in the areas we explore. Ours is the most socially-conscious audience in the history of radio and we would not be living up to our responsibility as broadcasters if we failed to stimulate this force to the best of our ability.

Public Service and Special Programming

Our increased commercial success has not lessened our commitment in the area of public service. We

retain on our staff the position of public service director and have a continual dialog with a wide number of community groups and interests, resulting in their knowledge that WMAL-FM knows their problems and is ready to give almost instant help in informing the community. We have also undertaken major campaigns designed to help combat drug abuse, fight the growing VD epidemic and inform the public about sickle cell disease. We have participated in three-station campaigns on behalf of the United Givers Fund, The Black United Fund and the Salvation Army.

Washington Redskins. WMAL-FM is the Redskins station on FM. Our involvement with and promotion of the Skins great championship drive, our daily talk shows with Jerry Smith, daily conversations on the air with Steve Gilmartin. "The Voice of the Redskins," have made us the leading FM sports station in Washington.

In Concert. Our broadcasts of these 90-minute rock specials, simulcast with WMAL-TV, has created an enormous audience for late night weekend programming. The acceptance by our audience of this, the most innovative new idea in entertainment programming in recent years, has opened the way for alternate week specials as well. The Music Festival, with John Lyon, is a locally produced 90-minute rock special featuring major artists recorded in concert settings.

Other Specials. Black Gold ran in April, 1973, as a 12-hour special featuring the greatest black musicians in pop music of the past 20 years. A coopera-

tive venture informing the public about Howard University's Center for Sickle Cell Disease research, *Black Gold* was underwritten by Safeway Foods. *Beatles '72* was a five hour concert exploring the influence in music and life style of the most dominant force in the history of rock music. *Tommy* was a specially showcased presentation of the rock opera.

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Docket No. 20682

IN THE MATTER OF
DEVELOPMENT OF POLICY RE: CHANGES IN THE
ENTERTAINMENT FORMATS OF BROADCAST STATIONS

MEMORANDUM OPINION AND ORDER

(Adopted: July 28, 1976;

Released: July 30, 1976)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENTING AND ISSUING A STATEMENT; COMMISSIONER ROBINSON ISSUING A SEPARATE STATEMENT.

1. The Commission has before it for consideration its *Notice of Inquiry* in Docket No. 20682, 41 Fed. Reg. 2859, 57 FCC 2d 580 (1976), concerning its policies and practices with respect to changes in the entertainment formats of broadcast stations. Also before the Commission for its consideration are the various comments and reply comments filed in response to the *Notice of Inquiry*. These comments are summarized in Appendix A.

2. This *Inquiry* grows out of the opinion of the Court of Appeals, *en banc*, in *Citizens Committee to Save WEFM, Inc.* v. *FCC*, 506 F.2d 246 (D.C. Cir.

1974), the latest in a line of cases[1] which hold that when an application for the sale of a radio station license is before the Commission, and in connection with that sale the purchaser intends to discontinue the station's existing entertainment format, if there has been expressed a significant amount of public protest to the effect that this change of format, if completed, would deprive the public of an entertainment format not otherwise available in the market, then the Commission must hold a hearing pursuant to Section 309 of the Communications Act, as amended, to determine whether the public interest would be served by a grant of the application. The Commission issued the *Notice* in this Docket to solicit public comments on the nature of the obligations imposed by these cases and whether the Commission could proceed to implement those obligations harmoniously with the Communications Act and the Constitution.[2]

[1] *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Service, Inc.* v. *FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Hartford Communications Committee* v. *FCC*, 467 F.2d 408 (D.C. Cir. 1972); *Citizens Committee to Preserve the Present Programming of WONO(FM)* v. *FCC*, No. 71-1336 (D.C. Cir.) (Order, May 13, 1971); *Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-FM)* v. *FCC*, 436 F.2d 263 (D.C. Cir. 1970).

[2] Several of the commenting parties, in addition to responding to the merits of this *Inquiry*, questioned the propriety if not the legality of conducting this proceeding at all. In the opinion of these parties, the opinion of the United States Court of Appeals in *Citizens Committee to Save WEFM, Inc.* v. *Federal Communications Commission*, 506 F.2d 246 (D.C. Cir. 1974), decides as a matter of law what policies may be pursued by this agency when a radio station seeks to modify an entertainment format despite wide-spread listener opposition to the proposed change. We reject this contention, for the reasons set forth in our Memorandum Opinion and Order of March 9, 1976, 58 FCC 2d 617 (1976).

3. We believe this important question must be examined within the framework of our basic legislative mandate. The Communications Act makes a fundamental distinction between common carrier and broadcast regulation, and, as the Court of Appeals has recognized, there is a degree of mutual exclusivity between them. See, *Hawaiian Telephone* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974); *Cf. Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380 (1975). Before the Communications Act was adopted, Congress debated carefully whether and to what extent the obligation of common carriage ought to be imposed on radio broadcast licensees.[3] It concluded, in the end, that the domains of radio broadcasting and common carriage ought to be kept distinct, and it enacted Section 3(h) of the statute to express this conclusion. Section 3(h) reads: " 'Common carrier' or 'carrier' means any person who is engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . .; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[3] This background is set out in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103-109 (1973).

4. Thus the Congress intentionally refrained from extending the full range of regulatory tools deemed appropriate for common carrier regulation to the field of broadcast regulation. While the Communications Act of 1934 created a public right to have access to any common carrier ". . . communications service upon reasonable request . . . ," 47 U.S.C. 201(a), Congress expressly rejected proposals to establish an analogous public right to access to the broadcast airways. Similarly, while the Act requires that common carriers receive Commission authority to commence or discontinue communications services, 47 U.S.C. 214, Congress did not enact an analogous requirement that broadcasters receive Commission authority to commence or discontinue programming, including program format services, offered to the public.

5. Notwithstanding this manifestation of Congressional intent, the Court of Appeals has in recent years attempted to impose various common carrier-like obligations on broadcast licensees, either by reading the Constitution to require it, or by interpreting the "public interest" language of the Communications Act to contain it. In *Business Executives Move for Vietnam Peace* v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971), the Court held that a broadcast licensee's policy of refusing to accept any paid announcements concerning controversial matters of public importance violated both the public interest mandate of the Communications Act and the First Amendment. The Court rejected the proposition that the policies of broadcasters, as essentially private businesses, did

not engage the obligators of "state action," and held that, since the station opened its doors to ordinary commercial messages, it could not be heard to assert that advertising, *per se*, was inherently disruptive of the proper functioning of the station. Having found the broadcasters' conduct to be constrained by the policies of the First Amendment, the Court of Appeals went on to hold that "The content of the idea which the excluded speakers wish to promote is—emphatically—*not* permitted as a distinguishing factor in itself." 450 F.2d at 660 (emphasis in original).

6. The Supreme Court, in reversing this decision, took account of Congress' manifest "desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations," *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 109 (1973), and noted that "The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claim under the umbrella of the First Amendment." 412 U.S. at 103.

7. The format change cases are closely related to the access issue presented in the *CBS* case. At issue in each situation is basically a conflict between the Commission and the Court of Appeals concerning the appropriate way to implement the policies of Congress under the Communications Act. As in the *CBS* case, the Court of Appeals here has sought to impose a common-carrier like obligation on radio broadcasters pursuant to its understanding of the public in-

terest language—in this case, Section 309—of the Communications Act. In *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 283 F.2d 204, 214 (D.C. Cir. 1960), the Court of Appeals observed that a common carrier has "a special legal status and obligations. . . This includes an obligation, deeply embedded in law, to continue service." The Court of Appeals went on to note that abandonment of service could not be lightly granted: if the carrier "Wants to abandon service because it must now share [the] market, or because it prefers to use that gas for more profitable unregulated sales, or because it wants to be rid of what it considers a vexatious servitude, these are not reasons for granting its request. Abandonment may be allowed only if the 'public convenience or necessity' permit."

8. In contradistinction to the "obligation, deeply embedded in law, to continue service" which common carriers must bear, the Communicationse Act "recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition." *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940). The Court goes on to explain:

> Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

The implication of this holding for entertainment formats is not open to doubt: broadcasters are to compete with one another, and they must necessarily do so in the domain of program formats, because there is virtually no other form that competition among broadcasters can take. It was through this regime of competition that Congress "aim[ed] . . . to secure the maximum benefits of radio to all the people of the United States," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217 (1943).[4] The Court of Appeals all but concedes the inconsistency of its views with those expressed by the Supreme Court in *Sanders Brothers* by suggesting that more recent cases, such as *FCC* v. *RCA Communications Inc.*, 346 U.S. 86 (1953), or *Hawaiian Telephone Co.* v. *FCC*, 498 F.2d 771, 776-777 (D.C. Cir. 1974), have placed in doubt the notion that competition was indeed Congress' plan for the broadcast industry under the Communications Act. But neither of these cases concerned the broadcasting industry. On the contrary, these are common carrier cases, whose relevance to the holding in *Sanders Brothers* is open to very serious question.

---

[4] The *NBC* case upheld the Commission's Chain Broadcasting regulations, the first in a series of regulatory efforts to preserve licensee discretion over program material and foster competition in local markets. In upholding the Prime Time Access Rule, a direct descendant of the Chain Broadcasting Rules, the Second Circuit noted: "It is clear that the Nation's policy favoring competition is one which the FCC must incorporate in regulating the broadcast media." *National Association of Independent Television Producers and Distributors* v. *FCC*, 502 F.2d 249, 256 (2d Cir. 1974).

9. The record in this Docket bears out the factual correctness of the underlying legislative assumption of competition to which the Supreme Court in *Sanders Brothers* refers. The Commission's study of program diversity in major markets, whose findings are summarized in Appendix B, decisively shows how effective the tool of competition has been in carrying out Congress' plan for entertainment programming. We find that reliance on this tool will produce program diversity of a sort, and in a form, that equates both to the welfare of radio listeners and to the public interest generally. In addition, there exist practical considerations with constitutional overtones which supplement the issues of statutory interpretation in bringing us to the conclusion that we must refrain from the detailed supervision of entertainment formats which the Court of Appeals holds to be a part of the Commission's statutory responsibilities. These considerations are explained more fully herein.

10. The *WEFM* decision has far-reaching ramifications for our entire scheme of radio broadcast licensing. Although this case, like the other entertainment format cases which the Court of Appeals has seen, arose in the context of an application for assignment, Section 309 deals not merely with transfers, but, more broadly, with all written applications which it is the Commission's duty to grant or deny under Title III of the Act. The public interest finding that the Commission is required to make before granting an assignment application is in no respect different from the public interest finding that must be

made before a renewal application may be granted; accordingly, nothing which the Commission is obliged to do in order to find that the public interest would be served by the grant of an assignment may properly be omitted in the much more common situation of an application for renewal.

11. The Commission's long and continuing reluctance to define and enforce the "public interest" in entertainment format preservation is based both on practical considerations and on our understanding of the structure and meaning of the Communications Act. The practical problems are simple to comprehend. To determine, in the context of a prospective format change, whether the public interest would be served by allowing it, we must ascertain: (1) what the station's existing format is; (2) whether there are any reasonable substitutes for that format in the station's market; (3) if there are not, whether the benefits accruing to the public from the format change outweigh the public detriment which the format abandonment would entail. Moreover, where a prospective purchaser alleged that its proposed new format would add as much program diversity to the communities in its service area as the abandonment of the old format would subtract, evidence would have to be heard on this issue as well.

12. In the renewal context, the Commission anticipates that the usual format abandonment protest would concern a *fait accompli*, *i.e.*, would involve a complaint that a licensee, with an obligation to operate his station in the public interest, had deprived

its service areas of a unique format during the previous license term, for which, accordingly, a sanction would in principle lie. The Commission could then well be obliged to designate a hearing on the renewal similar to that described in paragraph 11, *supra*, but more complex also, because it might include the question whether a format change had in fact actually occurred.

13. This last question presents an acute practical problem stressed in a number of the comments. How is the Commission to define what constitutes a particular entertainment format, and what demarks it from neighboring formats? The Court of Appeals has made it clear that it, for one, will not be satisfied by any Commission attempt to define formats broadly. Hence, "popular music" is not a sufficiently diacritical category to meet the Court of Appeals' conception of our public interest mandate; nor even, we infer, would be "rock music" or "classical music." Instead, the Commission is required to distinguish progressive rock music from the other species of the rock genre, *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973); likewise, as the Court of Appeals suggests in the *WEFM* opinion, we may be obliged to distinguish between 19th Century and 20th Century classical music, 506 F.2d at 264 n.28, and to make, in the context of an application for renewal, very real consequences turn on such distinctions.

14. In practical terms, "format" means program material. As Commissioner Robinson has put it:

"What makes one format unique makes all formats unique. . . . Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's 'sound' and that citizens' groups (and alas, appellate judges) call format." 57 FCC 2d 580, 594, 595 (1976) (concurring statement).

15. The elusiveness of a format's definition has a practical consequence in addition to a vagueness that makes it impossible for a broadcaster to know prospectively what sort of entertainment programming the public interest standard requires it to present. The same uncertainty that plagues the licensee's decisionmaking in the first instance will plague our review of the licensee's discretion. The Commission does not know, as a matter of indwelling administrative expertise, whether a particular format is "unique" or, indeed, assuming that it is, whether it has been deviated from by a licensee. Furthermore, we have not been afforded any degree of latitude in summarily deciding whether the station's finances are probative of an untenable format, even assuming it to be unique.[5] Accordingly, the Commission would

[5] In *WEFM* the Court was careful to note that the relevant financial inquiry was not whether the station *had been* financially profitable during the tenure of a particular format, because financial losses could proceed from a variety of causes (argued the Court) completely unrelated to the station's program menu. Rather, the relevant inquiry is whether the format *might have been* viable, 506 F.2d at 265-66. This is, we observe, an almost fantastically speculative point for inquiry, and one not subject to very satisfactory—and certainly not to incontestable—proof.

be obliged in the typical case to hold a hearing on renewal.

16. The evidence on this record supports the conclusion that the marketplace is the best way to allocate entertainment formats in radio, whether the hoped for result is expressed in First Amendment terms (*i.e.*, promoting the greatest diversity of listening choices for the public) or in economic terms (*i.e.*, maximizing the welfare of consumers of radio programs). The market allocation method is not, however, perfect. See Appendix B. We recognize that the market for radio advertisers is not a completely faithful mirror of the listening preferences of the public at large. But we are not required to measure any system of allocation against the standard of perfection; we find on the basis of the record before us that it is the best available means of producing the diversity to which the public is entitled. Appendix 2 of the filing of the National Association of Broadcasters, a description for the advertising trade of the radio stations in the New York and Washington, D.C. markets, shows that in large markets, with many aural services and intense competition, there appears an almost bewildering array of diversity. In New York, the menu includes all-news, classical music, rhythm and blues, Jewish ethnic, Greek ethnic, Spanish, country, modern country, country and gospel, talk, easy listening, middle of the road, show tunes, beautiful music, popular standard, and one which calls itself "mellow." How these various program themes differ from one another, and how each is faithful to its own conception, are questions we need not reach to observe the variety of choices available to radio listeners in the New York market.

17. Format allocation by market forces rather than by fiat has another advantage as well. It enables consumers to give a rough expression of whether their preference for diversity *within* a given format outweighs the desire for diversity *among different* formats. As Commissioner Robinson has observed, "with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. For example, in most large markets there are a number of . . . formats which seem identical on any objective or quantifiable basis; yet they are far from interchangeable to their respective audiences. Indeed, if people did not distinguish among these stations, there would be no reason for them to co-exist—and little economic likelihood that they would." 57 F.C.C. 580, 594-595 (1976).

18. A recent staff study of audience ratings for major market radio stations lends further credence to this observation. The results of that investigation indicate that audience ratings for major market radio stations tend to differ nearly as much for stations programming similar types of music (*e.g.*, middle of the road) as they do for stations programming markedly different types (*e.g.*, progressive rock as opposed to classical). This finding strongly indicates that audiences carefully discriminate in selecting stations. Given this situation, Professor Bruce Owen of Stanford University has demonstrated that maximization

of format diversity will not necessarily lead to increased listener satisfaction.[6] Indeed, Professor Owen shows that efforts to maximize format diversity through regulatory fiat could very well result in a *diminution* of consumer welfare: a format protected under the *WEFM* rationale may be of lesser value than the format which the broadcaster proposes to substitute. There is no way to determine the relative values of two different types of programming in the abstract. This is a practical, empirical question, whose answer turns on the *intensity* of demand for each format. It is impossible to determine whether consumers would be better off with an entirely new format without reference to the actual preferences of real people. In these circumstances, there is no reason to believe that government mandated restrictions on format changes would promote the welfare of the listening public. Indeed, in view of the administrative costs involved in such a program of regulation, and in view of the chilling effect such regulations would doubtlessly have on program innovation, there is every reason to believe that government supervision of formats would be injurious to the public interest. The record in this proceeding clearly points to the conclusion that such a program of regulation would not be compatible with our statutory duty to promote the public convenience, interest and necessity, and we so find.

---

[6] See Comments of National Association of Broadcasters, Appendix 1.

19. Finally, allocating entertainment formats by market forces has a precious element of flexibility which no system of regulatory supervision could possibly approximate. In our society, public tastes are subject to rapid change. The people are entitled to expect that the broadcast industry will respond to these changing tastes—and the changing needs and aspirations which they mirror—without having to endure the delay and inconvenience that would be inevitable if permission to change had to be sought from a government agency,[7] particularly after a full-scale evidentiary hearing. In this respect, it may not be widely appreciated what, precisely, is entailed in a hearing of the sort contemplated by Section 309 of our statute. It is not a brief or summary affair, but large-scale litigation which imposes enormous costs on the participants and the Commission alike. We do not know with any certainty the magnitude of the burdens imposed on broadcast licensees by hearing procedures of the sort contemplated by the Court of Appeals in *WEFM*, but it may be instructive to consider the costs to the Commission of the *WEFM* case, hearings on which have been proceeding pursuant to the Court's mandate on remand. The *WEFM* hearings may be considered fairly typical of format abandonment hearings: the administrative law judge is

---

[7] *National Broadcasting Co.* v. *FCC*, 516 F.2d 1101, 1133 (D.C. Cir. 1974) (opinion of Leventhal, J.), *vacated*, 516 F.2d 1180 (D.C. Cir. 1975, *cert. denied sub nom. Accuracy in Media, Inc.* v. *National Broadcasting Co.*, 96 S. Ct. 1105 (1976).

required to consider, basically, the issues mentioned in paragraph 11, *supra*, as well as a financial issue (see footnote 3, *supra*) and a misrepresentation issue. The ordinary case would generally be similar in complexity. And in this case, an administrative law judge held two pre-hearing conferences in Washington, D.C.; his preparation time was an additional eight hours. In addition, the Broadcast Bureau trial staff spent above two hundred man-hours of preparation time. Subsequently, hearings were held on nine separate dates in Washington, D.C., and on nine different dates in Chicago, from which a transcript of 3120 pages was compiled. Following the hearings, the Broadcast Bureau spent two hundred and forty hours preparing proposed findings of fact and the administrative law judge will have spent approximately two hundred and eighty hours preparing his initial decision. As Chairman Wiley has observed, "[e]ven after all relevant facts have been fully explored in an evidentiary hearing, we would have no assurance that a decision finally reached by our agency would contribute more to listener satisfaction than the result favored by station management." 57 FCC 2d 580, 586 (1976).

20. These costs, and the uncertainties that impose them, have a constitutional dimension as well. Under the threat of a hearing that could cost tens or hundreds of thousand of dollars, many licensees might consider the risks of undertaking innovative or novel programming altogether unacceptable. Several commenting parties mentioned this effect, and we regard

it as of great importance. The existence of the obligation to continue service, we find, inevitably deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no off-setting justifications, either in terms of specific First Amendment or diversity-related values or in broader public interest terms.

21. The administrative process "combines judicial supervision with a salutory principle of judicial restraint, an awareness that agencies and courts together constitute a 'partnership' in furtherance of the public interest, and are collaborative instrumentalities of justice." *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970). When such "partners" come to a point of fundamental disagreement, it is incumbent upon us to take a step back and rethink our entire position if this relationship is to be creative rather than destructive. This Docket is the occasion for the Commission to reconsider its policy on entertainment formats. We view the matter as one with very serious implications for the structure of the broadcasting industry, the administration of the Communications Act, and the meaning of the First Amendment. Our reflection, aided by extensive public comment on virtually every aspect of this matter, has fortified our conviction that our regulation of entertainment formats as an aspect of the public interest would produce an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion. Also, this entanglement would

certainly result from the Commission placing restrictions on the entertainment programming that a broadcaster could offer, because "a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed." *Lemon* v. *Kurtzman*, 401 U.S. 602, 619-20 (1971). See also *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 126-27 (1973). Any such regulatory scheme would be flatly inconsistent with our understanding of congressional policy as manifested in the Communications Act, contraproductive in terms of maximizing the welfare of the radio-listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation and experimentation in radio programming.[8] We are, of course, cognizant of our responsibility to implement the Court's mandate in the *WEFM* decision, 47 U.S.C. 403(h), and to that end a hearing on the WEFM assignment has been substantially completed. See Docket 20581, 40 F.R. 39549 (1975). Thus our

[8] The Commission has indicated that it would take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming. *Zenith Radio Corporation*, 40 FCC 2d at 231. Having given the entire matter further study, however, we have concluded that such a position is neither administratively tenable nor neecssary in the public interest. Rather, as discussed herein, we believe that the market is the allocation mechanism of preference for entertainment formats, and that Commission supervision in this area will not be conducive either to producing program diversity nor satisfied radio listeners.

statement here should not be viewed as a prejudgment of that proceeding, but rather as an expression of what, upon further serious reflection, we view to be an extremely unwise policy in which we and the Court have both become entangled. To emphasize our concern that the views we have set forth here will not be misinterpreted, the implementation of our new policy will be stayed for sixty days, and, if a petition for review is filed, until judicial review of this Order has been completed.

22. For the foregoing reasons, IT IS ORDERED, That the policy set forth above IS ADOPTED effective 60 days from the release date of this Order or, if any party seeks judicial review of this Order, upon final disposition of any such review proceeding. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

APPENDIX A

SUMMARY OF COMMENTS

1. The Commission received a variety of comments in response to its *Notice of Inquiry in Docket 20682* from both broadcasters and several citizen and public interest groups, students and other interested parties.[1] Not surprisingly, given the background of this proceeding, all broadcasters' comments were criti-

[1] A list of parties filing comments is appended to this summary.

cal of any attempt by the Commission to regulate the content of broadcast entertainment programming, while citizen and public interest group comments solidly favored Commission intervention in station entertainment format selection. The comments of other interested parties were divided on the question. The arguments for and against Commission regulation of broadcast station entertainment formats centered generally around the Commission's authority and responsibility under the First Amendment, and the statutory guidelines and dictates of the Communications Act of 1934, as amended. This breakdown corresponds to the two important questions we raised in the *Notice* and the comments may appropriately be discussed in terms of these two considerations.

The Constitution

2. Critics and supporters of Commission regulation of entertainment formats agree that the First Amendment applies to broadcasting, *Associated Press* v. *United States*, 326 U.S. 1 (1944); *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948), and that entertainment and music are included within the basic First Amendment protections, *Winters* v. *New York*, 333 U.S. 507 (1948). This, however, is the extent of agreement. Those who urge Commission regulation of entertainment formats on First Amendment grounds cite the following language in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) (*Red Lion*), as primary support for that position:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. *Red Lion*, *supra*, 395 U.S. at 390.

The National Organization of Women (NOW), who filed the most comprehensive constitutional argument in favor of regulation, states that this holding encompasses five existing elements within the fundamental First Amendment rights of listeners, to wit: (1) the right to receive ideas and information, (2) the right to diverse and antagonistic ideas, (3) the right of minority audiences to be protected by the FCC, (4) the right to be free from monopolistic domination of information sources, and (5) the right to pick and choose from competing entertainment formats and viewpoints. NOW believes that the public has a compelling First Amendment right to hear programming at its first preference level and that broadcasters' "somewhat undefined First Amendment right" are subservient to the above enumerated rights of listeners.

3. Opponents of Commission format regulation argue that the American system of broadcasting has, from the beginning, been founded on the principle

that decisions regarding program content should be left to station licensees and that the application of First Amendment guarantees to broadcasters protects and gives life to this principle. Although the broadcast medium presents special circumstances, such as the scarcity of frequency space, which permit certain forms of regulation that would not otherwise be constitutionally permissible, broadcasters unanimously agree that neither *Red Lion* nor any other constitutional argument can support the type of program regulation suggested by the Court of Appeals in *Citizens Committee to Save WEFM* v. *FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*WEFM*). Since it is the *Red Lion* decision which provides much of the support for those who desire Commission regulation of formats on constitutional grounds, many broadcasters attempt to distinguish this case. The comments on *Red Lion* range from a charge of "constitutional misinterpretation" (National Association of Broadcasters, NAB), to "a shift in the First Amendment's traditional focus" (Cornhusker Television Corporation, *et al.*, hereinafter "Cornhusker"). It is argued by the National Radio Broadcasters Association (NRBA) that the decision in *Red Lion* was based on the Court's conclusion that the Fairness Doctrine, while departing from the letter of preexisting First Amendment law, served the historical purpose of the Amendment to promote free and wide-ranging debate on public issues. This result is consistent, says NRBA, with constitutional decisions which permit the government to regulate the content of speech where such content reg-

ulation has a minimal impact on communication of ideas *and* is necessary to achieve a governmental interest of very great importance. NRBA makes the argument that access to different forms of entertainment formats is less compelling in constitutional importance than access to free debate on public issues and that the impact of format regulation on speech content would be far greater and more direct than that of the Fairness Doctrine. Cornhusker argues in its Comments that *Red Lion's* treatment of the Fairness Doctrine and personal attack rules was based on the long series of FCC rulings in the area, and reliance on Congressional approval of the Fairness Doctrine found in the legislative history of § 315 of the Communications Act. Cornhusker states that the decision dealt with questions concerning broadcaster obligations to present important public questions fairly and without bias, and notes that the Court strongly intimated that other questions related to the Commission's attempted oversight of program content would raise more serious First Amendment issues. *Red Lion*, *supra*, at 396. Accordingly, it is asserted that *Red Lion's* doctrine is not a broad mandate that applies with equal force to the wide range of broadcaster program discretion, including format selection. Broadcasters further argue that the subsequent Supreme Court decisions in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) and *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), have somewhat diluted the far reaching constitutional

implications of *Red Lion*. Especially significant in this regard is the language in *DNC*, reaffirming the journalistic rights of broadcasters. NOW, on the other hand, finds distinctions in these decisions which make them inapplicable to the central issue under consideration herein.

4. Other constitutional theories were advanced in the comments by those parties who object to Commission regulation of entertainment formats. One of these, asserted by the National Broadcasting Company and many others, is that any attempt by the Commission to develop standards or guidelines to be applied in format regulation would be so vague as to be void under constitutional doctrine. This is so allegedly because broadcast formats contain many components, *i.e.*, music type, music selection and placement, announcers, personalities, number and quality of commercials, specialty features, news scheduling; and a change in any one or combination of such components could constitute a change in a station's program format. Another theory argued is that the action of forbidding the broadcast of a particular format would be an unconstitutional prior restraint of free speech. The NAB claims that governmental application of a prior restraint bears a heavy presumption against validity, requiring for its justification compelling circumstance and procedural safeguards rarely demonstrated to the satisfaction of courts where protected speech is involved. Cornhusker advances yet another constitutional argument, that of the First Amendment doctrine of "less Drastic Means." This doctrine,

according to Cornhusker, limits congressional power to enforce requirements that impinge upon free speech activities and is described as follows:

> In a series of decisions [the Supreme Court] has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle governmental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. *Tucker*, 364 U.S. 479, 488 (1960).

Under this doctrine, to vindicate the *WEFM* requirement for Commission involvement in format selection, Cornhusker argues that it must be shown that the rights of listeners and viewers are unconstitutionally infringed without detailed oversight. It would have to be shown that a monopoly of the otherwise "uninhibited marketplace of ideas" prevail absent detailed FCC program scrutiny. Such a showing, Cornhusker alleges, is virtually impossible. There are "less drastice means" already available for program diversity; the combination of the commercial marketplace,[2] community ascertainment duties; and noncommercial educational radio and television to respond to programming incentives other than those of the commercial marketplace.

---

[2] It is repeatedly alleged in the comments that the present commercial marketplace provides a wide, albeit not perfect, diversity of formats.

5. A recurring theme running through much of the broadcaster comments in the constitutional area is the recognition that the Commission does have the authority to exercise its powers in a way that affects the content of broadcast programming, but that in no instance has this authority been interpreted, by the Commission or the courts, to allow the Commission to override a licensee's discretion as to one type of legally permissible programming and order that a specific type of programming content either be retained, or if it has been removed, reinstated. Moreover, the NAB notes that although some limited FCC intrusions into programming have been approved by the courts,[3] and that other decisions have upheld the Commission's refusal to intrude,[4] no court decisions have *compelled* the FCC to invade the area of licensee discretion except those dealing with format change. It is argued that such direct and affirmative intervention in broadcast station programming is violative of First Amendment principles. Proponents of Commission intervention, however, argue that intrusion into entertainment format selection is no different, or not radically different, in terms of content control, from the non-entertainment areas where the Commission has intervened in the past, *i.e.*, Fairness Doctrine, political

[3] *E.g., Red Lion, supra*, 395 U.S. 367; *National Broadcasting Company* v. *FCC*, 319 U.S. 190 (1943); *National Association of Independent Television Producers and Distributors* v. *F.C.C.*, 516 F.2d 526 (2nd Cir. 1975).

[4] *E.g., DNC, supra*, 412 U.S. 94; *Public Interest Research Group* v. *FCC*, 522 F.2d 1060 (1st Cir. 1975).

broadcasting, obscenity. Moreover, NOW argues that the Commission already has taken an affirmative role in monitoring and reviewing entertainment programming. Examples of such activity are identified as: (1) the Commission's Prime Time Access Rule which prohibits the use of certain types of feature films and network programs during specific time periods; (2) the comparison of entertainment programming when a "specialized-service" station is competing with a "general-service" station for a license, *Policy Statement on Comparative Hearings*, 1 FCC 2d 393, 397 (1965); and (3) the examination of program policies and proposals if there are significant differences in the program plans of comparative license applicants. *Id.* at 398. Opponents, however, raise several points in distinguishing Commission involvement in non-entertainment programming. Evening Star states that because of the vital role non-entertainment programs play in informing the public of current news and public affairs, there is a clear and logical public interest in the Commission taking a role in ensuring that such programming addresses the needs and problems of the community of each licensee. Entertainment programming, on the other hand, does not assume the same importance to community needs. Moreover, news and public affairs are not matters of public taste or preference, but rather are of universal interest and concern to the public. Rollins Broadcasting of Delaware, Inc., claims that the "scarcity of frequencies" argument used in *Red Lion* to support, in part, the need for "government imposed" diversity

of viewpoints on controversial issue programming is inapplicable to entertainment programming. This is so because radio station entertainment is basically music provided by records, tapes, and cassettes, each of which is easily available to the public. WNCN Listeners Guild (WNCN) criticizes this reasoning, claiming that reliance on non-radio alternatives would mean that the airwaves no longer belong to the listeners. The NAB claims that the Commission's differing treatment of non-entertainment programming reflects Commission recognition that a station's entertainment format is its primary means of competition, and that competition alone would not result in sufficient news and public affairs programming.

Statutory

6. The comments filed by supporters of format regulation advance little statutory basis for their position other than the general directive of Congress that the Commission regulate in the public interest. It is upon the public benefit that such regulation would allegedly promote, though, that supporters primarily base their case. This benefit is asserted to be a greater diversity of entertainment formats in individual markets, thereby satisfying the programming tastes of more individuals than achieved by non-regulation, *i.e.*, the competitive marketplace. The premise that the widest diversity in entertainment formats satisfies the widest number of listeners, thus promoting the public interest, is not only the belief of format regulation supporters; but also the motivation of the Court of Appeals in directing the Commission to regulate formats to "[secure] the maximum benefits of radio to all the people of the United States." *WEFM*, *supra* at 268. Critics of entertainment format regulation not only challenge this premise, but claim that such regulation is contrary to the Act.

7. In commenting upon the Commission's responsibility and authority under the Act, many critics of Commission regulation looked for guidance to the legislative intent of Congress. It is argued that examination of the statute itself, together with previous court interpretation, clearly demonstrates no congressional intent for the Commission to become involved in entertainment format regulation. Metromedia and Doubleday Broadcasting Company, Inc. suggest that Congress' inclusion of Section 326 in the Act proscribing censorship is virtually dispositive of the question. Other comments take a less truncated view, but claim that Congress' intent is clear from other indications. For example, although the Supreme Court, as noted in *WEFM*, has declared that "the avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States," there is no mention in the Act of formats, the nature of format diversity or the way in which such diversity is to be determined. In this connection, it should also be noted that no provision of the Act expressly grants the Commission even so much as general supervisory authority over programming content. Another indication of Congress' alleged

intent to preclude the Commission from regulating program content was its desire to create a broadcasting system based on competition. Format regulation opponents claim the *WEFM* court's statement that "there is no longer room for doubt that, if the FCC is to pursue the public interest, it may not be able at the same time to pursue a policy of free competition" is inconsistent with the intent expressed in the Act and prior judicial interpretation. Congress' intent to create a competitive broadcasting system is said to be evident from its explicit rejection of broadcasters as common carriers (47 U.S.C. 3 (h)). Additionally, the Supreme Court recognized this intent of Congress in *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940), when it stated:

> Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public. *Id.* at 475.

Also cited is the D.C. Circuit's language in *National Association of Theatre Owners* v. *FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), stating:

> . . . Congress apparently believed that once the clear dangers of combinations in restraint of trade were removed, competition among those providing broadcasting services in a given area would best protect the public interest. *Id.* at 203.

Since format is all a broadcast station has to compete with, it is argued that government dictation of format content will destroy competitive broadcasting.

8. The NAB strongly argues that the intent of Congress is further demonstrated by its inclusion in the Act of Section 310(d). This section basically declares that, in passing upon assignment and transfer applications, the Commission may only consider the qualifications of the applicant before it, rather than determining whether some other applicant may be better qualified. The NAB cites several passages from the Section 310(d) legislative history, and contends that said language clearly indicates the section was intended to prohibit not only comparisons between the proposed purchaser of a broadcast station and some third party, but comparisons between the qualifications of the seller and the purchaser as well. The NAB notes that in *Wichita-Hutchinson Co.*, 20 FCC 2d 584 (1969), the Commission held that Section 310(d) did permit comparisons between a seller and buyer, but maintains that such a holding is in error and should be reversed. Accordingly, the NAB concludes that the Commission is precluded from determining whether a proposed licensee's program format serves the public interest as well, or better than, an existing licensee's program format and that this section cannot serve as a basis for format consideration. NOW disagrees with this interpretation of Section 310(d), claiming that the clear language of the statute only prohibits comparing the programming of a seller to the programming of any individual

other than the proposed purchaser; and that the statute certainly cannot be read to prohibit the Commission from considering format changes.

9. Where the differences between proponents and opponents of Commission format regulation sharply come into focus is over the question of the extent to which such regulation will "serve the public interest." Proponents contend that the increasing number of protests against proposed format changes demonstrates that programming diversity in many markets is not as broad as it should be. WNCN alleges that broadcast licensees, rather than providing diversity, are moving more and more toward a bland uniformity of programming. This belief is based, in part, on the claimed increasing trend toward syndicated radio programming and the effects of a broadcast marketplace controlled by advertising rating systems. Opponents, on the other hand, argue that the present system of leaving the choice of program format to the discretion of the licensee has produced an extremely diverse, although not perfect, selection of programming and any attempt by the government to intervene in this process would have severe adverse public interest consequences. In support of this assertion, ABC submitted a report prepared by Robert E. Henabery (hereinafter referred to as the Henabery Report), a consultant on radio positioning, programming and operations and a specialist in new radio format development. The Henabery Report states that broadcast programming, determined by competition, has produced a wide diversity in formats, particularly in

the last decade. It is claimed that in the last decade, radio stations have gone from general service programming, *i.e.*, all things for all people, to specialized programming, *i.e.*, one particular program spread throughout the broadcast day. This transition has caused broadcasters to develop programming designed to appeal to specific categories of listeners, spurring a diversity in broadcast fare. In further support of the diversity achieved by operation of the marketplace, the Henabery Report submits the results of a study conducted in Washington, D.C. and Tulsa, Oklahoma. The report concludes that Washington, D.C. is a highly specialized and, because of its particular ethnic and cultural life, individualized radio market. Tulsa, a smaller market, is beginning to take on more specialization than ever before. The report also concludes that "the greater the number of stations the greater the specialization." The NAB, in Appendix 2 to its Comments, submits a breakdown of format content in New York City and Washington, D.C., and asserts that these formats cater to almost every conceivable taste. Another oft repeated negative public interest result of regulation is that licensees forced to operate with only marginally profitable stations will economize on news, public affairs and other forms of non-entertainment programming.

10. Another basic area of disagreement between regulation critics and supporters is the role competition plays in creating program content diversity. In the competitive marketplace, NOW claims that the factor motivating broadcast programming is a desire

to maximize profits through advertising revenue; and in seeking this end, broadcasters rely on the "demographics," rather than the "size," of a particular audience in choosing a program format. NOW states that the concept behind "demographics" is that there are certain audience groups which advertisers desire to reach because these groups are the most likely to spend money for the advertisers' products. It is crucial to the advertiser that the commercial reach as many people as possible who are likely to buy the product, but it is not crucial that the advertisement reach the maximum number of listeners because the advertiser has little interest in reaching individuals unlikely to purchase the product. Accordingly, broadcasters will appeal, through their entertainment programming, to the particular audience that will enable them to maximize advertising revenues. At the same time, broadcasters will shirk program formats which appeal to those audience groups whom advertisers do not wish to reach. Thus, listeners will not receive the type of programming they prefer unless the listener happens to belong to a "demographically" desirable group.

11. Broadcasters basically contend that the forces of competition create a wide diversity of program formats, some of which serve minority tastes, since all stations cannot utilize the same general format and economically survive. If there are 20 stations in the market, the point is very quickly reached where a minority-taste audience would be larger than a station's probable share of a majoritarian-taste audi-

ence. Thus, where there are many stations in the market, as there are in most urban markets, minority tastes will be served through the normal market mechanism. There is no dispute that broadcasters program to meet the tastes of particular demographic groups. It is claimed, though, that there is no evidence that radio advertisers, as a group, favor any particular demographic segment of the audience to the exclusion of others. (See Appendix 4, NAB Comments—Analysis of Requests From National Radio Advertisers.) NOW questions the validity of this explanation of marketplace behavior, arguing that the demographics of certain minority taste audiences may not be desired by advertisers. Under these circumstances, no programming will be directed to those minority tastes and the listeners in such groups will be deprived of the benefits of radio at their first preference level. WNCN rejects the Commission's position that regulation may not produce better results in the marketplace than competition, and opines that it could do no worse.

12. Regulation critics further allege that government regulation of formats will stifle innovation and experimentation in broadcast programming; resulting in less, not more, diversity. It is claimed that broadcasters will hesitate to try new programming if they fear being compelled to continue it against their better judgment. Comments from some parties indicate that such reluctance to experiment or change formats has already occurred since the Court's and Commission's recent treatment of "format cases" (Henabery

Report, p. 39; Doubleday Broadcasting Company, Inc.). WNCN claims this is a faulty "assumption," and asserts that until a careful and unbiased study of all format changes in major markets over a meaningful period of time is conducted neither it nor the Commission will know for sure whether this assumption is correct.

13. Another common argument against regulation is that it would result in an administrative quagmire and extensive oversight. The principal problem in any scheme of format regulation is alleged to be the categorization of programming content. As noted above in this summary, it is claimed that a broadcast station's program format consists of many components, of which entertainment is only one, and that in this sense, all formats are "unique." The components of a radio format are described in the Henabery Report as material, structure and style. Material being what is broadcast by the station, *i.e.*, music, personality comments, news, interviews, contests, weather and traffic bulletins, etc.; structure being the length of the material and its position in the hour relative to other material; and style being the personality of the material and the overall personality of the structure which houses material, *i.e.*, tempo and familiarity of songs, the mixing of the music, use of logos and jingles, tone of the newscaster. Alteration of any of these elements could produce either a format modification or a format change and, according to Henabery, the line between the two is often difficult to draw. A further problem in categorizing formats is

the repeated contention in the comments that the same format may be perceived differently by different people. This conclusion was reached by Entertainment Response Analysts, a broadcast programming research company, after conducting tests on individuals who were exposed to programming believed by the testers to be extremely similar (see Metromedia Comments, Attachment 5). The regulation of formats would also have the Commission examining the day-to-day programming decisions of broadcasters on a constant basis to determine programming shifts; a task alleged to be an administrative nightmare. In addition to these practical problems of regulation, broadcasters question the fairness of regulations which would saddle one broadcaster with only a marginally profitable format, while others who declined to innovate were rewarded with profitable operations. Another question raised is why should the Commission favor one minority taste over another simply because one was tried and one was not. A survey could very well show that an untried format had more of a demand than a tried one that is "unique" and changing. WNCN claims, however, that the regulation required by the *WEFM* decision is hardly so pervasive as that in other areas, such as obscenity, prime time access, and family viewing. WNCN asserts that "to say adjudication of listeners' challenges to the loss of unique formats constitutes pervasive regulation of licensee speech is like saying that the availability of courts for libel actions involves pervasive regulation of speech and press—neither is true, both are absurd."

14. Finally, it is argued by several opponents of format regulation that the *WEFM* decision, and the argument of regulation supporters, is based on the questionable assumption that the public interest is furthered by the greatest diversity in program formats. It is the opinion of Mr. Bruce M. Owen, an assistant professor of economics at Stanford University (see NAB comments, Appendix 1), that there is no necessary relation between diversity and consumer satisfaction. This conclusion is premised on the basis that consumers can and do have preferences among stations with similar formats. It could well be that the addition of a format already in a community would be more efficient in terms of consumer satisfaction.

Parties Filing Comments and Reply Comments

Alpha Epsilon Rho National Honorary Broadcasting Society (Central Michigan University Chapter)
American Broadcasting Company, Inc.
American Women in Radio and Television, Inc.
Annapolis Broadcasting Corporation
Belden, E. S.
Belo Broadcasting Corporation
Bloomington Broadcasting Corporation
Broadcast Interest Group
Citizens Committee to Save WEFM
Colorado Broadcasters Association
Columbia Broadcasting System
Communico Broadcasting
Conroy, Tamara B.
Coulborn, Lewis R.

Doubleday Broadcasting Company, Inc.
Dow, Lohnes & Albertson on behalf of Cornhusker Television Corporation and 17 Other Licensees
Dzurick, David
Earnest, David
The Evening Star Broadcasting Company
GCC Communications of Chicago, Inc.
Gsell, Charles
KBOA, Inc.
KEZY Radio, Inc.
KMAM/KMOE-FM Radio
Mazzella, Dr. Anthony J.
Merrill, Charles E.
Metromedia, Inc.
Moore, Barbara
National Association of Broadcasters
National Broadcasting Company, Inc.
National Organization of Women
National Radio Broadcasters Association
Nebraska Broadcasters Association
Nichols, Stephen
960 Radio, Inc.
Normandy Broadcasting Corporation
O'Malley-Kieffer Communications Company
Papp, Laszlo
Pennsylvania Association of Broadcasters
Powell, Richard E.
RKO General, Inc.
Rollins Broadcasting of Delaware, Inc.
Rounsaville, Robert W.
Ryan, Regina
Scripps-Howard Broadcasting Company
Shutkin, Thomas
Turner Communications Corporation

Voorhees, John
Wallace, Robert Pope
WEBC, Inc.
WNCN Listeners Guild

APPENDIX B

Upon receipt of the comments in Docket 20682, the Office of Plans and Policy undertook an evaluation of the economic arguments raised in those submissions as well as an empirical investigation of radio format diversity in the 25 largest metropolitan markets. The subsequent discussion will set forth our finding regarding the regulation of format changes.

The comments of Professor Bruce Owen of Stanford University merit particularly close attention.[1] Professor Owen presents an excellent analysis of the economic issues surrounding the radio format change cases as well as a convincing demonstration that federally imposed restrictions on format changes may actually result in a dimunition of consumer welfare. We are particularly concerned with this latter proposition given that our own empirical investigation tends to support Owen's analysis and subsequent conclusion.

In its format change decisions, the Court of Appeals has always assumed the existence of a necessary relationship between the number of different program

[1] See Bruce M. Owen, "Radio Station Format Changes, Diversity, and Consumer Walfare," Appendix 1 of the Comments of the National Association of Broadcasters in Docket 20682.

formats available in a given market and the welfare of consumers of radio programming. At first glance, this line of reasoning would appear to be sound. If formats belonging to the category are close substitutes, then it follows that format duplication is wasteful. Those who prefer to listen to a particular type of programming gain little through duplication, while other people are deprived of additional listening opportunities. Under these circumstances it would appear that a policy designed to encourage format diversity would serve the public interest.

But this conclusion suffers from a decisive flaw. Stations programming apparently similar formats may not be regarded as close substitutes by listeners. If so, then we can no longer be certain that maximization of diversity among apparently distinct formats would necessarily tend toward maximizing the satisfaction of radio listeners. Listeners may prefer to have more variety of a given type of music than the opportunity to hear a distinctly different type of fare. To illustrate, suppose a station currently programming classical music proposes to change its format to progressive rock. Further suppose that members of the listening public who prefer classical music object on the ground that another station is already devoting most of its broadcast day to rock music. Should the licensee be permitted to change his format?

The answer to this question is not immediately obvious. In theory preference should be given to that format which is of greater value to the consumers. Unfortunately, the Commission will find it impossible

to measure the relative values of different formats because there exists no litmus or *a priori* way of measuring how much particular formats are worth to the audiences. All that can be known is simply how many people listen to available programs.

Unfortunately, the size of a station's audience is not necessarily an appropriate measuring stick of the degree of satisfaction which listeners derive from its programming. That is, two different formats which attract audiences of equal size may not be of equal value. Preferences expressed by the audience of one format may be much stronger than preferences for the other, in which case the former should be the more valuable. In order to ascertain which format is the more valuable, one would have to know the intensity of demand for each. Again, there exists no acceptable, reliable way of measuring aspects of these consumer preferences because consumers are not required to pay for the opportunity to listen to radio. Nor does a willingness by a group of listeners to contest a format change by litigation adequately express a cognizable intensity of preference for the format that they desire to have retained (or recovered). In every case, an intensity value could be assigned only after obtaining some information about the economic resources of the protestants and the opportunity costs associated with their protest. Given the legal complexities and expenses that characterize format change litigation, one would expect that a willingness to go forward with such cases would be especially typical of persons of higher educational attainment and socio-economic

status. If this assumption is so, then it follows that rewarding the format preference of protestants would *by definition* discriminate against the effect on less well-off listeners who might be the beneficiaries of a licensee's proposed new programming plans.

In sum, there exists no economically rational basis for deciding which broadcasters should be allowed to change their formats and which should not. Nor, it may be added, is there any basis on which to conclude that Commission interference in the absence of such information would accord with any plausible version of the public interest. Even in the largest markets, the number of radio stations is insufficient to assure that every radio listener will have access to his first preference of entertainment programming. This is simply an indication not so much of the imperfections of our advertiser-supported radio industry as it is of the pluralistic nature of our society. However unfortunate, broadcasters will inevitably cater to some tastes at the expense of others, regardless of what institution—whether the free market or the federal government—must bear the responsibility for determining the types of formats that will be made available.

Traditionally, we have relied on competition to make these choices. Admittedly, this is not a perfect mechanism of format selection since those decisions will, for the most part, be made on the basis of which format promises to maximize the size of the audience. Again this may lead to selection of certain formats which are actually of lesser value to consumers than are

others which broadcasters could feasibly provide. Whatever the shortcomings of this allocative mechanism, it is highly unlikely that the Commission hearings will improve on it. In the absence of any information on the value which consumers place on particular formats, we simply cannot make a rational judgment as to which formats warrant protection and which do not.

This conclusion is further evidenced by an empirical investigation of format diversity in the 25 largest metropolitan markets. Table 1 summarizes an assessment of the availability of 18 logical groupings of format types in these markets as defined in the 1975 edition of *Broadcasting Yearbook*.[2] The categorization is, of course, somewhat subjective. For example, the "Black" format category consists of "jazz," "rhythm and blues," "soul" or any combination of the above. The "Classical Music" format, on the other hand, encompasses everything from the baroque oratorios of Handel to P.D.Q. Bach or Leonnard Bernstein's "Mass." Afficianados may, of course, object strongly to the suggestion that these composers and their works belong to the same pigeon-hole; this indicates that any effort to classify formats will be arbitrary. We therefore hasten to add that Table 1 is meant to provide only a rough indication of format diversity in the 25 largest markets. Moreover, as should be evident from the number and type of subcategories which make up each of the major groupings (see Table 2), the figures in Table 1 by no means fully reflect the breadth and variety of programming available to listeners in these geographic areas.

[2] *Broadcasting Yearbook 1975*, Washington; Broadcasting Publications Inc., 1975.

In spite of this qualification, the figures indicate a variety of formats are rather evenly distributed across all stations, particularly those operating in the 10 largest markets, not a surprising finding given the rather high degree of competition which characterizes the radio industry in these areas of the country. Financial success is generally determined by the broadcaster's ability to program a format which is both popular and distinct enough to attract a relatively large, loyal audience.

An effort was also made to evaluate the relationship between the type of format programmed by a station and its share of the audience[3] as a rough measure of the degree to which stations programming the same format are considered by consumers to be close substitutes for one another. This is an extremely important point since the notion that format duplication is wasteful rests on the assumption that listeners are no better off when they are furnished with a choice between two stations programming the same type of music than they would be if only one of those stations were available. If this assumption proves to be false, then it is simply fallacious to con-

[3] The share of the audience simply reflects the percentage of all listeners who are listening to radio at a given time which are tuned into a particular station. For example, if station WXYZ has a share of 3 between 7 and 9 a.m., then we know that approximately 3 percent of the audience listening to radio during that period were tuned into WXYZ.

clude that seemingly similar program types are in fact duplicative and consequently wasteful. Indeed, preference for one station over another clearly indicates that each is offering a distinctly different type of service. If they are perceived as being different, then we again face the dilemma of deciding which format is the more valuable and worth protecting, knowing full well that restrictions on format change will deprive some other group of a format which they would prefer to listen to if given the opportunity.

The degree of substitution between stations programming the same type of format is very much less than might at first be supposed. We performed a statistical analysis of the relationship between audience shares and the type of programming presented by individual stations in order to test the hypothesis that format type has no effect on audience ratings. If this hypothesis is true, then it follows that our format categories do not realistically indicate how much format diversity is available in these markets. It would also suggest that those stations programming seemingly similar types of formats are perceived by listeners to be quite different and accordingly are not close substitutes for one another.

The results of this analysis are reported in Table 3. They show that while the type of format did have a significant impact on audience, the magnitude of that impact is relatively small. Specifically, differences in formats accounted for only 6.6 percent of the variation in audience shares. Moreover, the results show that the variation in audience shares within

given format types is nearly as large as the variation between different types. Again, this indicates that formats of the same type (as defined in Table 1) are not close substitutes for one another.

There are any number of possible explanations for this phenomenon. As mentioned previously, listeners may perceive distinct differences in the types of programming common to a single format category. To the extent that categories do not capture whatever it is about the station's programming that consumers perceive as "special," they are analytically meaningless and accordingly, do not afford an appropriate basis on which to judge whether a station's programming is "unique."

This problem could be ameliorated to some extent by increasing the number of descriptive categories of formats, but this procedure would further complicate an already difficult hearing process inasmuch as administrative law judges will find it increasingly difficult to assess the extent of format duplication. Consequently, their decisions will likely become ever more arbitrary and less intelligible thereby increasing the probability that such decisions will run counter to the public interest. Nevertheless, this is precisely what must be done if the Commission is to follow the procedures applicable to format change protests outlined by the Court of Appeals.

In conclusion, we believe that format regulation is unnecessary and may very well impose costs on the general public. We recognize the shortcomings of the marketplace in allocating formats. However, given the difficulties in defining a meaningful format clas-

sification coupled with a total lack of information on the relative values associated with different types of programs, we are convinced that Commission decisions in this matter will automatically lack a rational underpinning. In short, they will simply reflect the subjective and necessarily arbitrary opinions of administrative law judges. We fail to see how this process will result in a more efficient allocation of entertainment formats than would be obtained if programming decisions were left in the hands of broadcast licensees, who are, after all, far more familiar with listeners' tastes.

TABLE 1

COMMERCIAL RADIO FORMAT AVAILABILITY IN THE 25 LARGEST METROPOLITAN MARKETS

Number of Stations Programming Specified Format

FORMAT TYPE	New York	Los Angeles	Chicago	Philadelphia	Detroit	Boston	San Francisco	Washington	Nassau-Suffolk	Dallas-Ft. Worth	Total
1. Beautiful Music	1 (2.3)*	5 (8.5)	8 (12.5)	3 (8.1)	4 (11.4)	3 (9.1)	2 (5.1)	2 (5.0)	-	2 (5.3)	30 (7.4)
2. Black	3 (7.0)	6 (10.2)	5 (7.8)	3 (8.1)	3 (8.6)	1 (3.0)	2 (5.1)	4 (10.0)	1 (5.3)	2 (5.3)	30 (7.4)
3. Classical	2 (4.7)	2 (3.4)	2 (3.1)	2 (5.4)	-	1 (3.0)	3 (7.7)	2 (5.0)	-	1 (2.6)	15 (3.7)
4. Contemporary	5 (11.6)	10 (17.0)	6 (9.4)	3 (8.1)	3 (8.6)	7 (21.2)	8 (20.5)	9 (22.5)	6 (31.6)	6 (15.8)	63 (15.5)
5. Country & Western	1 (2.3)	5 (8.4)	5 (7.8)	3 (8.1)	2 (5.7)	2 (6.1)	-	7 (17.5)	1 (5.3)	9 (23.7)	35 (8.6)

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 1 (*Continued*)

Number of Stations Programming Specified Format

FORMAT TYPE	New York	Los Angeles	Chicago	Philadelphia	Detroit	Boston	San Francisco	Washington	Nassau-Suffolk	Dallas-Ft. Worth	Total
6. Ethnic/Foreign Language (except Spanish)	1 (2.3)	1 (1.7)	4 (6.3)	-	2 (5.7)	2 (6.1)	-	-	-	-	10 (2.5)
7. Golden Oldies	1 (2.3)	2 (3.3)	1 (1.6)	-	-	1 (3.0)	-	-	-	1 (2.6)	6 (1.5)
8. Middle of the Road	9 (20.9)	10 (17.0)	15 (23.4)	12 (32.4)	11 (31.4)	7 (21.2)	10 (25.6)	5 (12.5)	9 (47.4)	9 (23.7)	97 (23.8)
9. News	2 (4.7)	2 (3.4)	3 (4.7)	1 (2.7)	1 (2.9)	1 (3.0)	3 (7.7)	3 (7.5)	-	1 (2.6)	17 (4.2)
10. Progressive (Rock)	3 (7.0)	1 (1.7)	5 (7.8)	2 (5.4)	3 (8.6)	3 (9.1)	2 (5.1)	1 (2.5)	1 (5.3)	1 (2.6)	22 (5.4)
11. Public Affairs	2 (4.7)	-	-	-	-	-	-	-	-	-	2 (0.5)
12. Religious	2 (4.7)	4 (6.8)	-	2 (5.4)	3 (8.6)	1 (3.0)	2 (5.1)	3 (7.5)	-	3 (7.9)	20 (4.9)
13. Rock	2 (4.7)	2 (3.4)	3 (4.7)	2 (5.4)	-	1 (3.0)	1 (2.6)	2 (5.0)	-	2 (5.3)	15 (3.7)
14. Spanish	2 (4.7)	2 (3.4)	2 (3.1)	-	-	-	2 (5.1)	1 (2.5)	-	1 (2.6)	10 (2.5)
15. Talk	3 (7.0)	2 (3.4)	-	2 (5.4)	-	-	-	1 (2.5)	-	-	8 (2.0)
16. Top 40	2 (4.7)	3 (5.1)	-	1 (2.7)	-	-	2 (5.1)	-	-	-	8 (2.0)
17. Varied	2 (4.7)	1 (1.7)	5 (7.8)	1 (2.7)	1 (2.9)	3 (9.1)	-	-	1 (5.3)	-	14 (3.4)
18. Other	-	1 (1.7)	-	-	2 (5.7)	-	2 (5.1)	-	-	-	5 (1.2)
Total Stations	43	59	64	37	35	33	39	40	19	38	407
No. of Different Formats	17	17	13	13	11	13	12	13	6	12	

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 1 (*Continued*)

Number of Stations Programming Specified Format

FORMAT TYPE	Pittsburgh	St. Louis	Houston	Baltimore	Cleveland	Minneapolis-St. Paul	Seattle-Everett-Tacoma	Atlanta	San Diego	Miami	Total
1. Beautiful Music	2 (5.3)	1 (2.9)	2 (6.3)	1 (3.1)	3 (13.0)	4 (12.9)	4 (12.5)	1 (2.9)	4 (16.7)	5 (21.7)	27 (8.9)
2. Black	1 (2.6)	2 (5.9)	2 (6.3)	4 (12.5)	3 (13.0)	1 (3.2)	2 (6.3)	4 (11.8)	-	1 (4.4)	20 (6.6)
3. Classical	-	-	1 (3.1)	2 (6.3)	1 (4.4)	1 (3.2)	2 (6.3)	1 (2.9)	1 (4.2)	1 (4.4)	10 (3.3)
4. Contemporary	13 (32.2)	6 (17.7)	5 (15.6)	4 (12.5)	1 (4.4)	4 (12.9)	4 (12.5)	5 (14.7)	6 (26.0)	4 (17.4)	52 (17.2)
5. Country & Western	2 (5.3)	7 (20.6)	7 (21.9)	5 (15.6)	3 (13.0)	4 (12.9)	3 (9.4)	8 (23.5)	2 (8.3)	2 (8.7)	43 (14.2)
6. Ethnic/Foreign Language (except Spanish)	-	-	-	-	2 (8.7)	-	-	-	-	1 (4.4)	3 (1.0)
7. Golden Oldies	-	-	-	-	1 (4.4)	1 (3.2)	-	1 (2.9)	-	-	3 (1.0)
8. Middle of the Road	11 (29.0)	11 (32.4)	7 (21.9)	9 (28.1)	6 (26.1)	12 (38.7)	7 (21.9)	5 (14.7)	6 (25.0)	3 (13.0)	77 (25.4)
9. News	-	1 (2.9)	-	-	-	1 (3.2)	-	2 (5.9)	1 (4.2)	-	5 (1.7)
10. Progressive (Rock)	2 (5.3)	2 (5.9)	3 (9.4)	-	-	2 (6.5)	3 (9.4)	-	1 (4.2)	1 (4.4)	14 (4.6)
11. Public Affairs	-	-	-	-	-	-	-	-	-	-	-
12. Religious	4 (10.5)	1 (2.9)	1 (3.1)	3 (9.4)	-	-	3 (9.4)	2 (5.9)	1 (4.2)	1 (4.4)	16 (5.3)
13. Rock	-	-	-	3 (9.4)	2 (8.7)	-	1 (3.1)	1 (2.9)	2 (8.3)	-	9 (3.0)

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 1 (*Continued*)

Number of Stations Programming Specified Format

FORMAT TYPE	Pittsburgh	St. Louis	Houston	Baltimore	Cleveland	Minneapolis-St. Paul	Seattle-Everett-Tacoma	Atlanta	San Diego	Miami	Total
14. Spanish	-	-	1 (3.1)	-	-	-	-	-	-	3 (13.0)	4 (1.3)
15. Talk	-	-	1 (3.1)	-	1 (4.4)	-	2 (6.3)	-	-	1 (4.4)	5 (1.7)
16. Top 40	-	2 (5.9)	-	1 (3.1)	-	-	-	2 (5.9)	-	-	5 (1.7)
17. Varied	2 (5.3)	1 (2.9)	2 (6.3)	-	-	1 (3.2)	1 (3.1)	2 (5.9)	-	-	9 (3.0)
18. Other	1 (2.6)	-	-	-	-	-	-	-	-	-	1 (0.3)
Total Stations	38	34	32	32	23	31	32	34	24	23	303
No. of Different Formats	9	10	11	9	10	10	11	12	9	11	

Number of Stations Programming Specified Format

FORMAT TYPE	Tampa-St. Petersburg	Milwaukee	Denver-Boulder	Cincinnati	Buffalo	Total	Total—Top 25 Markets
1. Beautiful Music	4 (13.3)	1 (3.7)	2 (6.5)	2 (11.8)	2 (9.1)	11 (8.7)	68 (8.1)
2. Black	1 (3.3)	3 (11.1)	1 (3.2)	1 (5.9)	2 (9.1)	8 (6.3)	58 (6.9)
3. Classical	-	1 (3.7)	1 (3.2)	-	-	2 (1.6)	27 (3.2)
4. Contemporary	4 (13.3)	7 (25.9)	4 (12.9)	4 (23.5)	4 (18.2)	23 (18.1)	138 (16.5)

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 1 (*Continued*)

Number of Stations Programming Specified Format

FORMAT TYPE	Tampa-St. Petersburg	Milwaukee	Denver-Boulder	Cincinnati	Buffalo	Total	Total—Top 25 Markets
5. Country & Western	8 (26.7)	4 (14.8)	2 (6.5)	3 (17.6)	3 (13.6)	20 (15.7)	98 (11.7)
6. Ethnic/Foreign Language (except Spanish)	-	-	-	-	-	-	13 (1.6)
7. Golden Oldies	-	-	-	-	1 (4.5)	1 (0.8)	10 (1.2)
8. Middle of the Road	6 (20.0)	6 (22.2)	9 (29.0)	2 (11.8)	4 (18.2)	27 (21.3)	201 (24.0)
9. News	-	-	1 (3.2)	-		1 (0.8)	23 (2.8)
10. Progressive (Rock)	1 (3.3)	2 (7.4)	4 (12.9)	1 (5.9)	2 (9.1)	10 (7.9)	46 (5.5)
11. Public Affairs	-	-	-	-	-	-	2 (0.2)
12. Religious	3 (10.0)	1 (3.7)	2 (6.5)	3 (17.6)	1 (4.5)	10 (7.9)	46 (5.5)
13. Rock	2 (6.7)	1 (3.7)	2 (6.5)	-	-	5 (3.9)	29 (3.5)
14. Spanish	-	-	1 (3.2)	-	-	1 (0.8)	15 (1.8)
15. Talk	-	-	1 (3.2)	-	-	1 (0.8)	14 (1.7)
16. Top 40	1 (3.3)	-	-	1 (5.9)	3 (13.6)	5 (3.9)	18 (2.2)
17. Varied	-	1 (3.7)	1 (3.2)	-	-	2 (1.6)	25 (3.0)
18. Other	-	-	-	-	-	-	6 (0.7)
Total Stations	30	27	31	17	22	127	837
No. of Different Formats	9	10	13	8	9		

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 2

Program Subcategories Belonging To Major Format Classifications

MAJOR FORMAT CLASSIFICATION	SUBCATEGORIES
Beautiful Music	Good Music Instrumental
Black	Jazz Rhythm and Blues Soul
Classical	Concert Fine Music Semi-classical Serious Music
Contemporary	Popular Request
Country and Western	Country Blue Grass Countrypolitan Contemporary Country Modern Country
Ethnic/Foreign Language	
Golden Oldies	Nostalgia Old Gold Solid Gold Classic Gold Solid Gold Rock
Middle of the Road	Adult Adult Contemporary Bright Up-Tempo Good or Easy Listening Standards Entertainment Conservative
All News	
Progressive	Underground Hard Rock Folk Alternative Free Form Progressive Rock
Public Affairs	
Religious	Gospel Sacred Christian Inspirational

Source: *Broadcasting Yearbook 1975*

Note: Stations which did not list their format in the *Yearbook* were contacted by telephone and asked to provide the information.

TABLE 2 (*Continued*)

Rock	
Spanish	
Talk	Discussion Interview Personality Informational
Top 40	
Varied	
Other	

TABLE 3

Results of the Analysis of the Relationship
Between Audience Ratings and Entertainment Formats
of Radio Stations Licensed to the 25 Largest Metropolitan Markets

Multiple R = .25738
R^2 = .06624
Std. Error = 3.7008

Analysis of Variance of		Sum Sq.	Mean Sq.	F
Regression	17	744.27	43.780	3.197*
Residual	766	10491.10	13.696	

Variables in the Equation

Format	Coefficient	Std. Error	F
Beautiful Music	1.3445	.87884	2.340
Black	.5324	.8878	.360
Classical	- 1.1122	1.0580	1.106
Contemporary	.6465	.80625	.643
Country & Western	- .35232	.8387	1.033
Ethnic/For. Lang.	- 1.765	1.2354	2.042
Golden Oldies	- .8898	1.3390	.442
Middle of the Road	- .12685	.7871	.026
News	2.9056	1.0818	7.214*
Progressive	- .4836	.9391	.265
Public Affairs	- 2.158	2.7195	.630
Religious	- 1.8628	.33484	3.970*
Spanish	- .5247	1.2997	.163
Talk	1.3920	1.2655	1.210
Top 40	1.0170	1.1102	.839
Varied	.1587	1.0955	.021
Other	- 1.5080	1.6824	.803
Rock (Constant)	2.408		

* Indicates that the equation or variable was significant at a .05 level of confidence.

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Changes in Entertainment Formats

(Docket No. 20682)

I do not dissent because I disagree that our concern for the loss of unique program formats must be restrained to some extent by the anti-gravitational energy of the First Amendment.[1] Nor do I disagree that government review of format selection—if not tempered—has the potential to impress us into a Section 326 minefield which no civil libertarian would countenance. Nor, again, do I disagree that the "marketplace" abhors an unfilled commercial need and that enterprise generally will hasten to satisfy unmet demands sufficiently identified and sufficiently lucrative.

I do dissent because, without suggesting an alternative response to minority format abandonment, the majority does not provide a mechanism to ensure service to significant minority tastes and needs if market forces do not. In this Republic, the role of regulation of commerce has been to offset and remedy errant or inefficient market forces. The Commission's role in the commercial regulatory structure is well defined.[2]

[1] But see *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969) where the Supreme Court indicated that the First Amendment is not abridged by the Commission "in interesting itself in *general program format* and the kinds of programs broadcast by licensees." (Emphasis added). See also my recent dissent in Docket No. 20203 (*Use of "Re-Run" Material in Prime Time*), —— FCC 2d ——, 76-639, July 19, 1976 (outlining authority for FCC program interest).

[2] With respect to the regulatory role involving programming functions, see generally *Red Lion* ("[i]t is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas which is crucial . . . ," 395 U.S. at 390); *National Broadcasting Company* v. *FCC*, 319 U.S. 190 (1943); *N.A.I.T.P.D.* v. *FCC*, 516 F.2d 526 (2d Cir. 1975).

I do not intend to imply a desire for the end of "format radio" or wish to impose a comprehensive duty on every station to proportionately serve every entertainment preference. Neither do I wish to impede program experimentation and creativity. But, equally, I stand by the *Separate Statement* of former Chairman Dean Burch in the *WEFM* case, which I joined, recognizing that extreme cases should compel our official attention. It was stated:[3]

> This is not to say, however, that licensees or applicants have unbridled discretion in selecting their entertainment formats. The Commission will take an extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming.

It could be, in light of the majority's vigorous arguments herein, that the courts, upon re-evaluation, will find that the present case law with respect to agency format review is overly intrusive.[4] I can only say that, if they do, I strongly feel that guidance must be given as to other actions to ensure that the Commission has the flexibility to correct significant neglect of the tastes, needs and interests of substantial

[3] *Zenith Radio Corporation*, 40 FCC 2d 223 at 230 (1973).

[4] In that connection, I suggested an approach to implementation of the judicially prescribed standards in my concurrence to the initiation of this Docket, 57 FCC 2d at 587, the attempted application of which I would have preferred. However, we have not fully experimented with those present standards ordained by the Court of Appeals or tried other criteria that might have been acceptable.

minority segments and to promote the diversity that is the linchpin of our regulation of public trustees. Thus, it is unquestionable that the Court of Appeals was correct in noting that a primary mission of this agency is to secure "the maximum benefits of radio to all the people of the United States," *Citizens Committee to Save WEFM, Inc.* v. *FCC*, 506 F.2d 246, 268 (D.C. Cir. 1974), and that accomplishment of that goal must not be hindered materially by absolutist orthodoxies.

Separate Statement of Commissioner Glen O. Robinson

My views on this subject were set forth in some detail in a statement accompanying the original notice of inquiry. They were, and are, completely in accord with the Commission's excellent opinion here. There is, however, one point that is omitted from the majority opinion that needs mention, the problem of uneven distribution of burdens arising from the *WEFM* mandate. I addressed this problem in my earlier separate statement, 57 FCC 2d at 598-99 and, eschewing modesty, I think it's worth quoting here:

> [If] our assumptions about the relationship between formats, licensees and the public interest have been beside the mark for all these years, . . . then it seems to me unthinkable that we should allow the consequences . . . to fall asymmetrically on licensees who are seeking assignment authorization. Indeed, elementary consid-

> erations of fair play as well as constitutional principles of equal protection would seem to forbid the Commission from placing on any one licensee the full weight of the obligation to promote diversity without imposing an equivalent burden of obligation to the public interest in diversity on its competitors . . . [If] the FCC's responsibilities to the public interest include the obligation to implement what the Court of Appeals has described as the "undoubted intention" of Congress that all major cultural groups be represented to the extent possible, I can see no escape from market by market allocation proceedings which would determine what array of formats a particular community required, together with which station would be allowed to use which format. With all its evils, this system clearly would be fairer than the one we have now (under the *Voice of Arts-Progressive Rock-WEFM* mandate) which, like Browning's Caliban on Setebos, lets "twenty pass and stone[s] the twenty-first/Loving not, hating not, just choosing so."

This consideration, of course, meshes with those that the Commission addresses and fortifies our conclusion that the regulation of formats is a business from which we should altogether abstain.

One final point: the Commission's opinion qoutes a statement by the Court of appeals that "agencies and courts together constitute a 'partnership' in furtherance of the public interest and are collaborative instrumentalities of justice." *Greater Boston Television Corp.* v. *FCC*, 444 F. 2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). This formulation of our relationship can be useful as a general, philosophical guide providing too much is not made of it. Just as the Court doubtless does not intend by this or any other expression to suggest that it has the responsibility for original formulation of communications policy or *de novo* review of Commission actions (as the Court itself makes clear in *Greater Boston*), so it should not be understood by our action here that we construe this partnership notion to give us the right to overrule the Court's mandate. While we draw on this partnership concept to support our firm expression of independent views on this matter contrary to those of the Court of Appeals, I trust all will recognize that we do so in the respectful posture of a junior partner who knows how to march once the marching orders have been authoritatively pronounced—once and for all.

APPENDIX E

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Docket No. 20682

IN THE MATTER OF
DEVELOPMENT OF POLICY RE: CHANGES IN THE ENTERTAINMENT FORMATS OF BROADCAST STATIONS

MEMORANDUM OPINION AND ORDER

(Adopted: July 27, 1977;

Released: August 25, 1977)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENTING; COMMISSIONER WASHBURN ABSENT; COMMISSIONER FOGARTY CONCURRING AND ISSUING A SEPARATE STATEMENT.

1. The Commission has before it for reconsideration its Memorandum Opinion and Order in Docket No. 20682, 60 FCC 2d 858 (1976), concerning policies and practices with respect to changes in the entertainment formats of broadcast stations.[1]

[1] Petitions for reconsideration were filed by Frank Kahn, the Office of Communications of the United Church of Christ, the Action Alliance of Senior Citizens of Greater Philadelphia, the WNCN Listeners' Guild, and Classical Music Supporters, Inc. We have also considered the late-filed comments of Molly Wilson.

2. This Order is the result of a public inquiry, 57 FCC 2d 580 (1976), which was prompted by the opinion of the Court of Appeals, *en banc*, in *Citizens Committee to Save WEFM, Inc.* v. *FCC*, 506 F.2d 246 (D.C. Cir. 1974). *WEFM* is the latest in a line of cases which hold that the Commission must conduct a hearing to determine whether a proposed sale of a broadcast station is in the public interest whenever (a) the purchaser intends to discontinue the station's existing entertainment format, (b) there has been a significant public protest complaining that the effect of this change would be to deprive listeners of a format not otherwise available in the market, and (c) there exists a question as to whether the format is, or could be, economically viable. After affording an oportunity for public comment on this matter, the Commission concluded that the regulatory scheme envisioned by the Court of Appeals was "inconsistent with our understanding of congressional policy as manifested in the Communications Act, contraproductive in terms of maximizing the welfare of the radio-listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation and experimentation in radio programming." 60 FCC 2d at 865-66. In issuing this statement, we were fully cognizant of the fact that an administrative agency is not authorized to overrule or reverse a mandate of the Court of Appeals. Our intention was simply to apprise the Court of the fact that, after a thorough reconsideration of the issues concerning changes in

entertainment formats, we were firmly convinced that the regulatory policy outlined in *WEFM* represented a serious departure from the policies which we believe are required by the Communications Act and the First Amendment. It is hoped that the Commission's Order will provide a helpful basis for further judicial consideration.

3. In the Order, we noted that the Communications Act draws a fundamental distinction between common carrier regulation and broadcast regulation. Common carriers and public utilities are subject to a comprehensive and pervasive scheme of governmental supervision, which typically includes an obligation to carry the messages of all customers on a non-discriminatory basis, see, *e.g.*, 47 U.S.C. § 201(a), and an obligation to continue service unless, and until, an administrative agency finds that its abandonment would serve the "public convenience and necessity," see, *e.g.*, 47 U.S.C. § 214. Congress carefully considered the question of whether broadcasters should be subject to common carrier regulation and concluded that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h). In contrast to the regime of detailed regulation which characterizes the world of the common carrier:

> The Act recognizes that the field of broadcasting is one of free competition. . . . Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

FCC v. *Sanders Brothers Radio Stations*, 309 470, 474 (1940).

4. We have expressed the view that this statutory distinction between common carriage and broadcasting has clear implications with respect to entertainment formats. Various parties requesting reconsideration of our order disagree with this conclusion and contend that free competition and common carriage are "but two points on a continuum rather than mutually exclusive and all inclusive alternatives." (Kahn Pet., p. 6). While it may, indeed, be useful to look upon these concepts as points on a continuum, it must be recognized that, as we move further along the line in the direction of greater regulation, we will at some point have abandoned the Congressional plan of using competition as the means of securing the maximum benefits of radio to all the people of the United States. In this regard, it must be recognized that meaningful competition between stations must necessarily focus on program formats. There is virtually no other area in which competition is possible.

5. The extent to which the Court of Appeals' policy represents a departure from the stature policy of free competition is made more apparent when we consider the regulatory tools which would be necessary to implement a scheme of format regulation. The Court has held that a unique format may not be abandoned unless it can be demonstrated that it is

financially untenable, and that the station's poor financial position is "attributable to the format itself" rather than to other factors. 506 F.2d at 262. According to the petition of the United Church of Christ:

> All this means is that the Commission has an obligation to examine the licensee's results of operation to determine that the loss was not created by unreasonable salaries, extraordinary casualty losses, unrelated investments, deduction for expenditures which should have been capitalized, improvident or wasteful expenditures, etc. *This is a task which rate regulating bodies perform every day of the week. The Commission exercises similar responsibilities in regulating common carriers.*

(UCC Pet., pp. 31-32) (emphasis added). While we do not agree with the Church's assessment of the degree of difficulty involved in this form of regulation, we do agree that it has much in common with the Congressional plan for regulating common carriers.[2]

6. We believe that the record in Docket No. 20682 demonstrates the reasonableness of the Congressional decision to rely on competition to promote the public interest in broadcasting. In our major cities, market forces have resulted in a wide variety of specialized

[2] Some parties would carry the analogy much further. One petitioner suggests that the most direct way of dealing with the problem envisioned by the Court of Appeals would be to reduce "economic determinism" by placing a limit on broadcast profits and to treat broadcasting as a "quasi-utility." (Kahn Pet., pp. 13-14).

radio formats. As we have previously noted, the "menu" in New York "includes all-news, classical music, rhythm and blues, Jewish ethnic, Greek ethnic, Spanish, country, modery country and gospel, talk, easy listening, middle of the road, show tunes, beautiful music, popular standard, and one which calls itself 'mellow.'" 60 FCC 2d at 863. The Court of Appeals has stated that this form of diversity is inadequate because it fails to serve "the diverse interests of all the people of the United States . . . . *to the maximum extent possible.*" 506 F.2d at 268 (emphasis added). A number of parties requesting reconsideration have echoed this view stating, for example, that the number of formats is "limited by the fact that possible (and probably nonexistent) formal types such as comedy, live Music, Documentary (both public affairs and cultural), Drama, Quiz Show, etc." are not presented in the major markets. (Kahn Pet., p. 8). It is also suggested that one can conceive of formats which are inherently superior to those which are presently heard by the public. Thus, the United Church of Christ suggests that "expert witnesses could provide a rational basis for believing that programming drawn from the culture of say, China or Japan, would make a greater contribution to the diversity of social, political, esthetic, moral and other ideas than another 'Request' station." (UCC Pet., p. 20). We must concede that, even in our largest radio markets, competition does not result in the widest variety of clearly distinct formats which can be conceived of by the mind of man (or in the Court's language pro-

mote diversity "to the maximum extent possible"). At the same time, we do not believe that it is appropriate to measure the success of competition against such a standard.

7. We understand the complaint of the Action Alliance that the emphasis on demographics in broadcast advertising may cause the interests of its members to be underrepresented. The model of free competition does not work to provide perfectly equal treatment for all categories of citizens, as we recognized in our earlier order and as the Court had observed in *WEFM*. While the presentation of formats may tilt in favor of other demographic groups, we have seen no evidence that the entertainment tastes of the elderly have been ignored by broadcasters. In any case, neither Action Alliance nor any of the other proponents of FCC format regulation come to grips with the alternative to the inperfect system of free competition that we believe Congress mandated in the Act—that is, a system of broadcast programming by government decree. We adhere to the view expressed in the Order "that our regulation of entertainment formats as an aspect of the public interest would produce an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion." 60 FCC 2d at 865.

8. Although it is recognized that competition will result in some degree of format duplication, we firmly believe that continued reliance on forces in the marketplace provides a positive benefit to the public by allowing listeneres to give some means of expressing

"whether their preferences for diversity *within* a given format outweighs the desire for diversity *among different formats*," 60 FCC 2d at 863, and also by providing a competitive spur which assures that stations offering popular format types will not become indifferent to the tastes of their listeners. The staff study which was associated with our Order provides support for the assumption that audiences perceive and appreciate differences between seemingly similar formats.[3] Unfortunately, there is no way to determine the *intensity* of consumer demand for particular formats, and whether listeners would prefer an entirely new format to a variation within an established format. One commenting party asks why the absence of a means of measuring demand-intensity should operate to favor the market place over Commission regulation. (Action Alliance Pet., p. 5). One answer is that, unless we were to favor regulation for its own sake, it would be hard to justify rules which for all we know may do more harm than good. Even if we occasionally guessed right and opted for a format which was consistent with the desires of radio listeners, the very existence of regulation in this field could be expected to have a chilling effect on the development of new entertainment formats, and on the ability of stations to respond to the ever-changing tastes and needs of our society.

[3] The staff studies reproduced as Appendix B to the Order consisted of merely a compilation and analysis of information readily available to the public. The studies were done shortly before release of the Order and have been made available in their entirety to any party who desired to see the documentation supporting the study.

9. Moreover, we would note that arguments such as these and similar ones made by other petitioners reflect what in our view is a disturbing trend that has resulted in this Commission being drawn into the supervision of broadcast programming to an extent that is consistent with neither the intent of the Communications Act nor with sound public policy. The stated goal of the United Church of Christ in this regard—preserving the public's access to the rich diversity of cultural traditions in this country and in others—is a worthy goal and one that is without doubt in the public interest. The Commission has, in a number of significant ways over the years, recognized and taken action to foster that goal. That action, though, was of an indirect nature related to the structure of the broadcast industry—the chain broadcasting rules, the multiple ownership rules, the prime time access rules—and did not involve the type of direct government involvement in programming that these petitioners seem to want, and that the *WEFM* standards seem to require.

10. We continue to believe that the allocation of formats by market forces has a highly desirable element of flexibility which could not be approximated by any system of governmental supervision. The uncertainty, expense and delay which are inevitably connected with an evidentiary hearing are factors which any prudent business man would have to consider prior to proposing a change of format. Furthermore, it may be expected that these matters will weigh very heavily in cases involving the transfer

of a station to new ownership. In such cases, it will frequently be difficult to hold together a new organization and the financing necessary to support it over an extended period of time. This problem will pose particularly serious difficulties for groups with limited access to risk capital. Such individuals may raise the financing necessary to purchase a station only to find out that capital will not be available to cover the costs associated with extended administrative proceedings.

11. The probability of a chilling effect resulting from the prospect of a hearing is not the only problem that would be associated with a program of format regulation. As we have previously indicated, the administration of such a program would require "a comprehensive, discriminating and continuing state surveillance." 60 FCC 2d at 865, *quoting*, *Lemon* v. *Kurtzman*, 401 U.S. 602, 619-20 (1971). The lines which distinguish one format from another are becoming increasingly obscure. It is well known, for example, that many artists may be heard with frequency on stations with a variety of formats. Distinctions between formats become even more difficult to make when it is recognized that a station's format may evolve over a period of time rather than changing all at once. In recent years, for example, progressive rock stations have moved away from the "high-energy" and "heavy-metal" sounds that dominated this format in the 1960's; such changes may take place over a period of years with softer, more harmonious records gradually replacing titles with hard

rock characteristics. In the end, we are left with a sound which is still properly referred to as "progressive rock," but which has changed substantially so that many of the station's original listeners may no longer be satisfied, while a large group of new listeners may be attracted. In these circumstances, it is extremely difficult to ascertain on an objective or principled basis what line distinguishes a given format from its neighbors, and at what point a change in programming may amount to a change of format for the purposes outlined in *WEFM*.[4] Any second-guessing of licensee judgment would necessarily be highly subjective, and we are convinced that detailed governmental scrutiny into such matters would raise serious First Amendment problems.

12. The United Church of Christ, in its petition, characterizes the Commission's real motivation in pursuing a policy of not regulating format changes as "not so much based upon First Amendment consid-

[4] In the *WEFM* case, the Commission was ordered to inquire into whether a station with a "fine arts" format was a reasonable substitute for the "classical" format which WEFM proposed to abandon. In a later decision by a panel of the D.C. Circuit, it was apparently assumed that these two formats involved in the *WEFM* case were the same as a practical matter. It was stated that "[a]t stake was a classical music format provided by only one other station in WEFM's service area." *Home Box Office* v. *FCC*, —— F.2d ——, No. 75-1280 (D.C. Cir., March 25, 1977), slip opin. at 49 n.49. While the significance of this statement is unclear, we do not take it to mean that a station could change its format only if two reasonable substitutes would remain in the market.

erations as upon the fact that entertainment programming constitutes the licensee's revenue base and is, therefore, very sensitive indeed." (Pet., p. 35). In the context of making this point, UCC relies upon a statement of the *WEFM* court that we believe does warant response. That is the somewhat rhetorical question posed by the Court:

> Precisely why the balance [between free competition in broadcasting "and the reasonable restriction of that freedom inherent in the public interest standard]" should be struck with entertainment programming in one pan and everything else in the other is not clear. The Policy Programming Statement pays a great deal of attention to First Amendment considerations in justifying the FCC's non-interference in entertainment matters, but familiar First Amendment concepts would, if anything, indicate a lesser—not a greater—governmental role in matters affecting news, public affairs and religious programming.

506 F.2d at 267. The answer to that question, quite simply, is that the format regulation which seems to us to be demanded by *WEFM* would be enormously more intrusive into licensee decision making than the Commission's present involvement in the news and public affairs area. This implication of this argument, as amplified by the UCC, that the Commission "regulates" news and public affairs programming in a manner remotely resembling format regulation is plainly wrong. To the extent that the Commission exercises some direct control of programming,

it is primarily through the fairness doctrine and political broadcasting rules pursuant to Section 315. In both cases the Commission's role is limited to directing the licensee to broadcast some *additional* material so as not to completely ignore the viewpoints of others in the community. See, *e.g.*, *Fairness Report*, 48 FCC 2d 1 (1974); *National Broadcasting Co.* v. *FCC* ("Pensions"), 516 F.2d 1101 (1974), *vacated*, 516 F.2d 1180 (1975), *cert. denied*, 424 U.S. 910 (1976); *Straus Communications, Inc.* v. *FCC*, 530 F.2d 1001 (1976). These regulations are extremely narrow, the Commission's role is limited by strictly defined standards, and the licensee is left with virtually unrestricted discretion in programming most of the broadcast day. In contrast, if the Commission were to assert the supervisory control of program formats required by *WEFM* and proposed by these petitioners, we would be faced with the prospect of rejecting virtually the entire broadcast schedule proposed by the private licensee, and it is not inconceivable that we could also be faced with directing a licensee to adopt a particular type of format, thus requiring him to broadcast all of his entertainment programming of a type he had not been broadcasting and that he did not desire to broadcast. While we would not argue that there are higher First Amendment values associated with entertainment as opposed to news and public affairs programming, the former is clearly within the Amendment's protection, and establishing a hierarchy of protections is a risky business. *Joseph Burstyn, Inc.*

v. *Wilson*, 343 U.S. 495 (1952); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). In view of our limited involvement in licensee decision making in the area of news and public affairs as compared to the pervasive, censorial nature of the involvement in format regulation that *WEFM* requires, we find nothing anomalous about the balance we have struck.

13. The petitioners raise a number of objections to the staff study which accompanied our Order and to certain aspects of the Order reached, in part, on the basis of that study. Specifically, they argue that the Commission cannot, on one hand, maintain that a free marketplace has afforded a wide array of program options, and then suggest that administrative law judges will not be able to assess the relative merits of preserving a "unique" radio format. We find nothing inconsistent with these conclusions. Data presented in Table 1 of Appendix B indicates the availability of a large number of clearly distinct radio formats in the 25 largest radio markets. Admittedly, the format classifications employed in the analysis are less specific than those which would be used for decisional purposes. However, more precise classification would only show a *wider* degree of format diversity than is indicated by the figures in Table 1. As we noted in the Opinion and Order, this conclusion is further evidenced by the analysis of the relationship between entertainment formats and audience shares. Wide variations in audience shares accruing to stations programming the same

type of format, suggest that listeners perceive significant differences between seemingly similar formats. The petitioners do not contest this point. They simply suggest that it has nothing to do with the relative values or intensity of preferences for different types of entertainment programs. The petitioners further contend that, if this is true, the staff's findings concerning the availability of radio programming should have had no bearing on the Commission's decision. We do not agree. Regardless of the pros and cons of format regulation, it is apparent that competitive forces at work in the largest radio markets have engendered a wide array of entertainment programs. We can only conclude that this particular criticism of the Commission's Opinion and Order has resulted from a misinterpretation of the staff study and our reliance on that analysis.

14. As noted in the Opinion and Order, format change proceedings will, among other things, necessitate that the hearing examiner determine: (1) what the station's existing format is; (2) whether there are any reasonable substitutes for that format in the station's market; and (3) if there are not, whether the benefits accruing to the public from the format outweigh the public detriment which the format abandonment would entail. The analysis of the relationship between format and audience shares bears on the first two issues. The staff's discussion regarding the lack of information on intensities of demand and the necessary lack of subsequent rational underpinnings

to format change decisions is pertinent to the third and decisive issue.

15. As noted above, the statistical analysis contained in Appendix B suggests that it will be no easy matter to define a station's format and to determine whether that format is unique. As noted, the analysis clearly demonstrates that audiences perceive many differences between seemingly similar formats. Hence, stations programming the same type of format may not be particularly good substitutes from the point of view of many, if not most listeners. Admittedly, this could be due to any number of factors including the musical tastes of particular audiences, the quality of the station's signal, the attractiveness of on-the-air personalities and so forth. Whatever the reason, the analysis indicates that the Commission will find it particularly difficult to determine whether there are reasonable substitutes for a station's existing and/or proposed format. Consequently, any decision to distinguish a particular format as being unique or having a good substitute will necessarily reflect the arbitrary perceptions of administrative law judges. There is simply no other means of reaching a decision of this nature unless both formats at issue are clearly identifiable and unique to a particular market. Unfortunately, this is seldom the case. Indeed, the question of whether a particular format is unique will largely depend on the ears of the beholder. The staff's analysis of formats and audience shares simply bears out this conclusion. It does suggest that reasonable definitions of formats will have to be much

more specific than those used in the analysis. However, as classifications become more precise, the Commission will find it increasingly difficult to evaluate the availability of close substitutes if more precise or specific format classifications are used to determine uniqueness. Indeed if the petitioners' criticism of overly broad format classifications used in the staff study were carried to their ultimate conclusions, every format available in a given market could probably be rationalized as being unique.

16. Again, we hasten to add that the statistical analysis presented in Appendix B only pertains to problems in assessing the uniqueness of radio formats. Assuming a format at issue is determined to be unique, the Commission would then be left to determine whether the public interest would be adversely affected by the proposed change. We have mentioned that the Commision is in no position to make this determination due to a lack of information on the intensity of preferences for various types of formats. The petitioners apparently believe that this problem can be overcome with the application of a little common sense. If this were so, we would gladly accept the challenge. However, given American people's disparate tastes and opinions regarding types of entertainment and the use of leisure time, we are fearful that one man's "common sense" solution will appear thoroughly nonsensical to others. This is precisely why the Congress and the courts have vested broadcasters, acting as public trustees, with the authority to identify and program to the tastes of their

audiences without undue interference from the federal government or from private groups demanding access to the airwaves in order to propagate their particular interest.

17. In conclusion, we remain convinced that program format regulation is an extremely complex and unwise affair. Nevertheless, we recognize the fact that our conclusions in this regard are fully subject to judicial review. For this reason, the implementation of our new policy will continue to be stayed until court review has been completed.

18. For the foregoing reasons, IT IS ORDERED, That the petitions for reconsideration are DENIED and that the effectiveness of our Order will continue to be stayed pending the final disposition of judicial review.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Development of Policy concerning Changes in the Entertainment Formats of Broadcast Stations, Docket No. 20682, on Reconsideration.[1]

I share the petitioners' deeply felt concern that the "mass audience" orientation of commercial broadcasting has a marked tendency to cater to breadth, rather than depth, of audience interest, and thereby may ignore and neglect significant minority needs and tastes. I also am of the view that this Commission has a clear role and responsibility to ensure "the maximum benefits of radio to all the people of the United States," *Citizens Committee to Save WEFM, Inc.* v. *FCC*, 506 F.2d 246, 268 (D.C. Cir. 1974), and that this role and responsibility cannot be abdicated, either in the news and public affairs or the entertainment programming areas.[2] Where the public stands to lose a "unique" program format which has been responsive to the tastes, needs, and interests of a substantial segment of the community, I believe the Commis-

[1] The initial decision in this proceeding was taken on July 28, 1976, before I joined the Commission.

[2] As the Supreme Court has clearly stated:

> "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . it is the right of the public to receive a suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

sion must take an extremely hard look at the potential loss to determine if it can be reconciled with the public interest in an overall diversity of programming sources or otherwise sanctioned in terms of competing or countervailing public interest or constitutional considerations.

While I am, therefore, in basic agreement with the policy thrust of the court's mandate in the format change cases, I also share many of the Commission's concerns with respect to the definitional and administrative difficulties which this agency may encounter in strictly adhering to that mandate. In particular, as more fully discussed at paragraphs 15 and 16 of the Commission's Order, strict adherence to the court's mandate might appear to require the most subjective and possibly arbitrary of administrative judgments as to what constitutes a "unique" format. The possible indices and arguments concerning "uniqueness" are virtually infinite, and unless this Commission is allowed sufficient leeway of judgment, we may be forced into a mode of analysis and decision which defies the practical limits of administrative law in favor of the vagaries of perceptual psychology and metaphysics.

I also recognize, as the Order herein argues, that full Commission implementation of the court's mandate may draw this agency too deeply into the review of particular program content thereby setting us on a collision course with the First Amendment. I share much of the Commission's hesitation, but hav-

ing raised this issue, I would defer its resolution to the judiciary.

For these reasons, I concur specially in the Commission's decision to the extent it respectfully seeks further judicial guidance as to the implementation of the mandate of the format change decisions.

APPENDIX F

Relevant portions of the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*, are reproduced below:

Section 3(h), 47 U.S.C. 153(h), provides:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 303(g), 47 U.S.C. 303(g), provides:

> Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> * * * * *
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Section 309(a), 47 U.S.C. 309(a), provides:

> Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon

examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 310(d), 47 U.S.C. 310(d), provides:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Section 326, 47 U.S.C. 326, provides:

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Section 402(b), 47 U.S.C. 402(b), provides:

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305331 126